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EFFORTS BY FEDERAL AGENCIES TO CIRCUMVENT THE COMPETITION IN CONTRACTING ACT

COMPLETED

ORIGINAL

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HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

MARCH 5, 1986

Printed for the use of the Committee on Government Operations

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EFFORTS BY FEDERAL AGENCIES TO CIRCUMVENT THE COMPETITION IN CONTRACTING ACT

WEDNESDAY, MARCH 5, 1986

House of Representatives,
Legislation and National Security Subcommittee
of the Committee on Government Operations,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Frank Horton, Jim Saxton, Joseph J. DioGuardi, and Thomas D. (Tom) DeLay.

Full committee staff present: William M. Jones, general counsel; James E. Lewin, chief investigator; James E. Rife, Charles C. Wheeler III, R. Michael Long, and Robert S. Richard, professional staff members; Catherine S. Cash, staff member; Stephen M. Daniels, minority staff director and counsel; and Alexander Cook and Greg Kilgore, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. Brooks. The subcommittee will come to order, and we will begin our hearings on attempts by this administration, and others, to once again circumvent the recently passed Competition in Contracting Act.

As you may know, Federal agencies' opposition to this legislation has been vehement. During the consideration of the Competition Act by this committee and the Congress, the Defense Department and the Justice Department and the OMB worked actively to prevent its passage. Congress, faced with reports of widespread waste and abuse plaguing Government contracting, overcame their efforts and the bill was signed into law in 1984. While failing to stop enactment, these agencies have continued to fight the implementation of the law, despite the reforms being so urgently needed.

The Competition Act created bid protest systems within the GAO and the GSA Board of Contract Appeals to resolve charges of illegal conduct on the part of procuring agencies. These forums allow vendors, whoever they may be, who believe they have been injured by abusive contracting practices, to challenge the Government and other vendors through a fair and equitable proceeding.

In this case, for example, EDS—a Texas outfit, and I have nothing against them; maybe they're right, who knows—has some controversy with AT&T and Volt and Xerox, and they're not ma and pa stores next door. These people have a disagreement as to how the procedure on the procurement was carried on, and it's a legitimate disagreement and ought to be resolved by the Board of Contract Appeals. The plaintiffs are all willing to have it adjudicated at that level, and it's just unbelievable that the Government Printing Office, that bunch of people—and we're going to look at them a lot more, I want to guarantee you—wants nobody to look at the kind of cockamamie deals they make. They don't even want somebody to evaluate it.

Well, if they're above that kind of surveillance, we're going to look at them steady from now on, because if it bothers them on this, you wait until we get a hold of them later. I'm going to know them like I know my favorite opponent.

Apparently, the OMB and the Justice Department just don't believe that any bid protest function is needed. Soon after enactment of the Competition Act, these agencies ordered—ordered—all Federal contracting officers to ignore GAO's bid protest forum as if it did not exist. They were not stopped until their wrongdoing—their absolute brazen and arrogant attempt to flout the law—was exposed before this committee, and the courts ordered them to obey the law. They don't read so well, apparently.

Now the OMB and Justice have taken aim at the GSA Board by attempting to undermine its bid protest function as well. And frankly, it is understandable why agencies are so hostile to the GSA Board. It threatens their old wasteful, entrenched ways of doing business.

Since the passage of the Competition Act, the Board—and I do not even know who the members are and have not dealt with them directly—has gained a reputation for providing just relief to contractors who have been abused by the agencies and their favorite vendors. Already, the Board has put open and honest competition back into the Federal marketplace, and a lot of people find this very uncomfortable. You know, it's just disgraceful to be able to go in and lay out the case as to who did what and why. Later, they may even find out if somebody had some benefits to be derived from such arrangements.

One such case involves a $300 million contract awarded by the GPO—that's the Government Printing Office—on behalf of the U.S. Army. Based on numerous allegations of misconduct, various vendors protested the award to the GSA Board. Before the merits of the case could be considered and evaluated by the Board, the GPO hastily requested OMB to block action of the Board. They are pressing the OMB, a political policy office of the President, to exert control over a quasi-judicial forum. In effect, the GPO contends that OMB has the authority to determine which cases the Board may or may not hear. This would not only be highly improper but would violate the express intent of the Competition Act.

We have asked the agencies involved to come down here today before the subcommittee to explain their actions and see if we can resolve this obvious conflict. We have also invited some other key interested parties.

We will now proceed with the hearings after a statement by Mr. Frank Horton, the ranking Republican on this committee.

Mr. **Horton**. Thank you, Mr. Chairman.

You and I have worked together for many years to make the procurement system more uniform, more streamlined, and more equitable. Two of our landmark efforts in this field are the Brooks Act and the Competition in Contracting Act.

The first of these laws is based on the principle that central management review of proposed ADP procurements will lead to increased efficiency and economy in Government purchasing.

The second law, which is the Competition in Contracting Act, includes a significant new authority for consideration of protests of ADP procurements, based on the philosophy that the procurement process can best be policed by affected private parties.

We are confronted this morning with a situation in which both of these laws are under attack. Agencies which value their own independence more than saving the taxpayers dollars and private companies which want to shield their procurement negotiations from judicial review and scrutiny have joined forces in an attempt to reverse the important reforms that we initiated.

The immediate consequence of this attempt is that the bid protest system is not functioning as it was designed, and a company which may not deserve a contract is being allowed to perform under it. The long-range consequence is that the Federal procurement process could be subject to all the failings it contained before the Brooks and Competition Acts became law.

Mr. Chairman, I do not want to preserve these statutes merely because you and I wrote them. I speak in strong support of them because they are good laws, good for the Federal taxpayers.

I welcome the opportunity to hear from our witnesses this morning about the problems we face and how we should overcome them. I am also anxious to hear from the three agencies which play key roles in this drama: The Government Printing Office, the Department of the Army, and the Department of Justice. I am disappointed that these agencies declined invitations to attend, and I hope that another hearing on this subject can be scheduled in the near future, so that they may provide us with their views.

Mr. **Brooks**. Thank you, Mr. Horton.

Our first witness this morning is A.G.W. "Jack" Biddle, president of the Computer & Communications Industry Association, which he founded in 1972. He is accompanied by David Cohen—come up and sit down, gentlemen—senior partner in the law firm of Cohen & White, a local firm.

Mr. Biddle, we appreciate your taking time this morning to share your views with us. Your statement will be made part of the hearing record, and you can please continue.

STATEMENT OF A.G.W. "JACK" BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ARLINGTON, VA, ACCOMPANIED BY DAVID COHEN, SENIOR PARTNER, COHEN & WHITE, WASHINGTON, DC

Mr. **Biddle**. Mr. Chairman, Mr. Horton, members of the subcommittee, it is a privilege to appear before you today to testify regarding a serious abuse of the Brooks Act and the Competition in Contracting Act by the Government Printing Office and OMB.

Our organization has been vitally concerned with the preservation of competition in Federal procurement. The CCIA is an association of approximately 70 member companies, which represent all facets of the telecommunications and computer industries. Our members compete actively for Federal contracts. The CCIA is a strong supporter of both the Competition in Contracting Act [CICA], and the role of the GSA Board of Contract Appeals as a forum to resolve protests over the award of data processing contracts.

We have recently been made aware of protests filed by Xerox, AT&T, and Volt at the GSA Board of Contract Appeals against the award of a contract by the Government Printing Office to Electronic Data Systems.

We take no position on the merits of these protests, but we are extremely concerned by the actions of the GPO and OMB which may undermine the bid protest system established by CICA.

It is important to keep in mind the importance of bid protests to the competitive procurement system established by Congress in the Competition in Contracting Act. When it enacted CICA, Congress had before it the dismal statistics which showed that as much as two-thirds of agency procurements were performed without competition. Congress had before it numerous examples of waste and abuse which noncompetitive procurement produces. And Congress had something more.

The record before this committee proved that unless Congress established an effective system for enforcing requirements to compete Federal contracts, agencies would continue their past practices of invoking trumped up justifications and so-called urgent requirements to evade the instructions of Congress to increase competition.

The bid protest sections of CICA provided the enforcement mechanism which Congress required. By giving competing vendors an effective tool to challenge the award of noncompetitive contracts, Congress set up a system where vendors could prevent their competitors from obtaining improper sole-source contracts.

Congress was particularly concerned about the need for an effective process system for data processing contracts. Because many of these contracts are highly complex, Congress correctly concluded that a special forum was needed to resolve protests concerning these contracts. Congress authorized the GSA Board to decide bid protests and gave the Board powers to stop protested procurements unless the procuring agency had truly urgent requirements. In this manner, Congress prevented agencies from rushing to award protested contracts and thereby blocking protesters from obtaining meaningful relief—a problem that occurred all too frequently in pre-CICA protests at the General Accounting Office.

Congress also realized that protested procurements could not be held up indefinitely and therefore required the Board to decide all cases within 45 working days.

Finally, to ensure that all parties received a fair hearing at the Board, Congress gave both protesters and procuring agencies the right to appeal Board decisions to the Court of Appeals for the Federal Circuit.

Although it has been in operation for little more than a year, the Board has successfully implemented Congress' intent to provide a remedy for fast and effective enforcement of CICA. According to statistics compiled by Senator Pryor, 59 percent of the Board's decisions have forced procuring agencies to adhere to competitive requirements which had been violated in particular procurements. The Board has met its 45-working-day deadline and thereby minimized delays to agency procurements.

On a broader basis, reports from procuring agencies show that CICA's mandate to increase competition has produced the intended result. For example, one agency reported that it exceeded its fiscal year 1985 goals for competitive awards by over 6 percent, even though CICA had been in effect only slightly more than 6 months. That same agency has set a fiscal year 1986 goal for competitive awards, which is 27 percent higher than its goal for 1985.

We seriously question whether agencies would show this substantial improvement without the Competition in Contracting Act and the implementation of a strong bid protest system to enforce it and to support it.

To put it simply, that system is now in jeopardy. OMB and GPO have challenged the ability of the GSA Board to decide the most basic question which every tribunal must answer, the scope of its own jurisdiction. One day before the Board denied motions by GPO to dismiss the Volt, Xerox, and AT&T protest for lack of jurisdiction, GPO went to OMB and asked OMB to decide the same question. GPO purported to invoke OMB's authority under the Brooks Act to resolve management disputes between executive branch agencies.

But this authority has no relevance to this protest in particular or to the Board's bid protest powers in general. Congress made this point perfectly clear in the legislative history of CICA, which was issued by this committee.

Notwithstanding this clear direction from Congress, OMB has agreed to review whether the protested procurement is within the scope of Public Law 89-306 and therefore within the Board's jurisdiction. We understand that OMB was supposed to issue a decision on the day this testimony was prepared. OMB's action raises several serious problems for the effective continuation of the GSA Board protest remedy.

First and most important, it perpetuates a course of conduct which flouts the intentions of Congress. This committee will no doubt recall that OMB played a central role in instructing agencies not to comply with the stay provisions of CICA's GAO bid protest provisions. Although OMB subsequently backed down, its recent conduct shows that it will continue to attempt to undermine the CICA bid protest system.

By reviewing the Board's jurisdiction over a protested procurement, OMB is attempting to create a forum for reviewing Board decisions, which is contrary to CICA's review procedure. CICA contains a procedure for review of GSA Board of Contract Appeal decisions—appeal to the Court of Appeals for the Federal Circuit. The fact that CICA established this review procedure for GSBCA protests should resolve any question as to whether Congress intended other forums to serve the same function.

If the legislative history were silent on this matter, the actions of OMB could perhaps be understood, although not condoned. But Congress was careful to delineate the precise role that OMB would have under CICA, and that role clearly did not include meddling with the protest procedures of the GSA Board of Contract Appeals.

GPO has sought to misconstrue the legislative history in a brief which quotes the following sentence from this committee's report on H.R. 5184, the House version of the Competition in Contracting Act, and I quote: "With regard to OMB's authorities under the Brooks Act, the bill does not alter the current procedures for resolving conflicts between procuring agencies and GSA's Procurement Office under the Assistant Administrator for Information Resources Management."

However, GPO does not acknowledge the next sentence, which makes clear beyond a doubt that OMB would have no role in connection with a procurement that had been protested to the GSA Board of Contract Appeals. The committee stated, and I quote: "However, the resolution of disputes (outside the courts) between procuring agencies and suppliers or potential suppliers shall be decided *solely* by the Board or the GAO under the procedures established by this bill."[1]

Congress has had sound reasons for directing OMB to steer clear of the Board's protest procedures. Interjection of OMB into bid protests creates dangerous obstacles for a process which must work quickly, if it is to work at all.

OMB is apparently trying to establish the point that a party can interrupt a GSA Board protest at any time by asking OMB to decide whether GSA, and thus the Board, has jurisdiction over a protested procurement.

OMB is under *no* deadline in which to render such a decision. It will be impossible for the GSA Board to dispose of protests within 45 working days, the statutory deadline imposed by Congress, if OMB is allowed to interfere at will with the Board's procedures.

The intervention of OMB into the process has other consequences as well. Congress selected the Board as an impartial administrative law forum which was positioned to render decisions that were fair to all parties. OMB's involvement in bid protests raises the prospect that the protest process will become politicized. If allowed to continue, OMB's efforts to dominate the Board will undercut the objectivity which the Board has provided in the CICA bid protest system.

OMB's involvement in the Xerox, Volt, and AT&T protest has also created massive procedural confusion which has ground the Board's proceedings to a halt. In order to stop the Board while OMB was reviewing its jurisdiction, GPO and EDS went to court and obtained a temporary restraining order. The court which issued the order subsequently admitted that it had no jurisdiction over the case and transferred the suit to the Court of Appeals for the Federal Circuit.

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[1] H. Rept. 98-1157, Competition in Contracting Act of 1984 (Oct. 10, 1984) at 27 (emphasis added).

We have now heard that one of the parties was considering appealing that order to yet another court, the Court of Appeals for the District of Columbia Circuit.

At this point, the record in this case is now so confused that the Court of Appeals for the Federal Circuit has stayed all proceedings. These facts prove beyond a doubt that CICA's protest procedures must provide clear lines of review if they are to work effectively. The proliferation of suits and appeals that this protest has spawned are clearly attributable to OMB's involvement. If allowed to continue, some court will have to decide who will review OMB's decisions and what impact they will have on a GSA bid protest.

Protesters may be forced to litigate in four separate places before they can obtain a final decision. The GSA Board, OMB, the Court of Appeals for the Federal Circuit, and whatever court ultimately decides that it can review OMB's decisions, assuming those decisions are reviewable by a court.

Congress should use its oversight authority to stop this chaos now. CICA created a clear-cut, effective bid protest system, which is now being distorted so that procurement abuses will be allowed to continue, and agencies will be able to escape effective review.

From the Board's promising start as a provider of effective protest remedies, OMB now seeks to move us to a new structure in which the Board can provide no remedies at all. This is contrary to not only the intentions of Congress, but also the goal of procurement reform.

We ask the support of this committee to prevent unauthorized Executive actions from eroding the gains won through legislation.

Mr. Chairman, I would like to respond to any questions the committee might have.

[Mr. Biddle's prepared statement follows:]

CCIA

STATEMENT OF

A.G.W. BIDDLE

PRESIDENT

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

RELATIVE TO THE EFFORTS BY FEDERAL AGENCIES TO

CIRCUMVENT THE COMPETITION IN CONTRACTING ACT

MARCH 5, 1986

Mr. Chairman, members of the Subcommittee, it is a privilege to appear before you today to testify regarding a serious abuse of the Brooks Act and the Competition in Contracting Act by the Government Printing Office and the Office of Management and Budget. Our organization has been vitally concerned with the preservation of competition in federal procurement. The CCIA is an association of approximately 70 member companies which represent all facets of the telecommunications and computer industries. Our members compete actively for federal contracts. The CCIA is a staunch supporter of both the Competition in Contracting Act (CICA) and the role of the GSA Board of Contract Appeals as a forum to resolve protests over the award of data processing contracts.

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Although it has been in operation for little more than a year, the Board has successfully implemented Congress's intent to provide a remedy for fast and effective enforcement of CICA. According to statistics compiled by Senator Pryor, 59% of the Board's decisions have forced procuring agencies to adhere to competitive requirements which had been violated in particular procurements. The Board has met its 45 working day deadline and thereby minimized delay to agency procurements. And on a broader basis, reports from procuring agencies show that CICA's mandate to increase competition has produced the intended result. For example, one agency reported that it exceeded its FY 85 goals for competitive awards by over 6%--even though CICA had been in effect only slightly more than 6 months. That same agency has set an FY 86 goal for competitive awards which is 27% higher than its goal for FY 85. We seriously question whether agencies would show this substantial improvement without the Competition in Contracting Act and the implementation of a strong bid protest system to enforce it.

To put it simply, that system is now in jeopardy. OMB and GPO have challenged the ability of the GSA Board to decide the most basic question which every tribunal must answer: the scope of its own jurisdiction.

One day before the Board denied motions by GPO to dismiss the Volt, Xerox and AT&T protests for lack of jurisdiction, GPO went to OMB and asked OMB to decide the same question. GPO purported to invoke OMB's authority under the Brooks Act to resolve management disputes between Executive Branch agencies. But this authority has no relevance to this protest in particular and the Board's bid protest powers in general. Congress made this point perfectly clear in the legislative history of CICA which was issued by this Committee.

Notwithstanding this clear direction from Congress, OMB has agreed to review whether the protested procurement is within the scope of Public Law 89-306, and therefore within the Board's jurisdiction. We understand that OMB was supposed to issue a decision on the day this testimony was prepared. OMB's action raises several, serious problems for the effective continuation of the GSA Board's protest remedy.

First, and most important, it perpetuates a course of conduct which flouts the intent of Congress. This Committee will no doubt recall that OMB played a central role in instructing agencies not to comply with the stay provisions of CICA's GAO bid protest provisions. Although OMB subsequently backed down, its recent conduct shows that it will continue to attempt to undermine the CICA bid protest system.

By reviewing the Board's jurisdiction over a protested procurement, OMB is attempting to create a forum for reviewing Board decisions which is contrary to CICA's review procedure. CICA contains a procedure for review of GSBCA decisions--appeal to the Court of Appeals for the Federal Circuit. The fact that CICA established this review procedure for GSBCA protests should resolve any question as to whether Congress intended other forums to serve the same function.

If the legislative history were silent on this matter, the actions of OMB could perhaps be understood, although not condoned. But Congress was careful to delineate the precise roles which OMB would have under CICA. And that role clearly did not include meddling with the protest procedures of the GSBCA.

GPO has sought to misconstrue the legislative history in a brief which quotes the following sentence from this Committee's report on H.R. 5184, the House version of the Competition in Contracting Act:

> With regard to OMB's authorities under the Brooks Act, the bill does not alter the current procedures for resolving conflicts between procuring agencies and

> GSA's procurement office under the Assistant Administrator for Information Resources Management.

However, GPO does not acknowledge the next sentence which makes clear beyond doubt that OMB would have no role in connection with a procurement that had been protested to the GSA Board of Contract Appeals. The Committee stated:

> However, the resolution of disputes (outside the courts) between procuring agencies and suppliers or potential suppliers shall be decided solely by the Board or the GAO under the procedures established by this bill.
>
> H.R. Report 98-1157, Competition in Contracting Act of 1984 (October 10, 1984) at 27. (Emphasis added).

Congress had sound reasons for directing OMB to steer clear of the Board's protest procedures. Interjection of OMB into bid protests creates dangerous obstacles for a process which must work quickly if it is to work at all. OMB is apparently trying to establish the point that a party can interrupt a GSBCA protest at any time by asking OMB to decide whether GSA--and thus the Board--has jurisdiction over a protested procurement. OMB is under no deadline in which to render such a decision. It will be impossible for the GSA Board to dispose of protests within 45 working days--the statutory deadline imposed by Congress--if OMB is allowed to interfere at will with the Board's procedures.

The intervention of OMB into the process has other consequences as well. Congress selected the Board as an impartial, administrative law forum which was positioned to render decisions that were fair to all parties. OMB's involvement in bid protests raises the prospect that the protest process will become politicized. If allowed to continue, OMB's efforts to dominate the

Board will undercut the objectivity which the Board has provided in CICA's bid protest system.

OMB's involvement in the Xerox, Volt and AT&T protests has also created massive, procedural confusion which has ground the Board's proceedings to a halt. In order to stop the Board while OMB was reviewing its jurisdiction, GPO and EDS went to court and obtained a temporary restraining order. The court which issued the order subsequently admitted that it had no jurisdiction over the case and transferred the suit to the Court of Appeals for the Federal Circuit. We have heard reports that one of the parties was considering appealing that order to yet another court--the Court of Appeals for the D.C. Circuit. At this point, the record in this case is now so confused that the Court of Appeals for the Federal Circuit has stayed all proceedings. These facts prove beyond doubt that CICA's protest procedures must provide clear lines of review if they are to work effectively. The proliferation of suits and appeals that this protest has spawned are clearly attributable to OMB's involvement. If allowed to continue, some court will have to decide who will review OMB's decisions and what impact they will have on a GSBCA protest. Protesters may be forced to litigate at four separate places before they can obtain a final decision--the GSA Board, OMB, the Court of Appeals for the Federal Circuit, and whatever court ultimately decides that it can review OMB's decisions, assuming those decisions are reviewable by a court.

Congress should use its oversight authority to stop this chaos now. CICA created a clear-cut, effective bid protest system which is now being distorted so that procurement abuses will be allowed to continue, and agencies will be able to escape effective review. From the Board's promising start as a provider of effective protest remedies, OMB now seeks to move us to a new structure in which the Board can provide no remedies at all. This is contrary not only to the intention of Congress, but also to the goal of procurement reform. We ask the support of this Committee to prevent unauthorized Executive actions from eroding the gains won through legislation.

Mr. Brooks. Thank you very much.

I have a question. What is your view of GPO's assertion that since it did not get a delegation of procurement authority, the 600-S procurement is not subject to the Brooks Act?

Mr. Biddle. Frankly, sir, I think this outrageous. In effect, they are saying that any procurement is not in the Brooks Act so long as the agency violates the Brooks Act by not seeking a delegation of procurement authority.

This argument would totally subvert the Brooks Act and encourage agencies to engage in wholesale violations of its provisions. I do not think—well, ignorance of the law is no excuse. But they are very much aware of the fact that you need a DPA to buy data processing equipment and services.

Mr. Brooks. Mr. Biddle, how does the Computer & Communications Industry Association view the Board's handling of its bid protest function?

Mr. Biddle. Mr. Chairman, speaking for my members, they are exceedingly enthusiastic and I think that is equally true of nonmembers of our association, who have experienced the effectiveness of the GSA bid protest procedure.

Mr. Brooks. Now those groups represent thousands of contractors.

Mr. Biddle. Well, we represent some 70 major contractors to the Federal Government, and a number of——

Mr. Brooks. How many?

Mr. Biddle. About 70. But I have also discussed this issue with many other companies within the computer industry. They have felt that CICA has provided a real positive benefit. Among other things, it has caused an agency to sit down and really examine their initial procurement specifications to ensure that they are soliciting the maximum possible competition.

A lot of the settlements that have come out of the bid protest process are just that. They are settlements between the procuring agency, who has reconsidered their specifications or reconsidered the way they have competed the buy, and gone about doing it in a better way. And that protest, subsequently, is dropped.

Those that have gone on to resolution have again, in approximately half of the cases, shown that there were serious flaws in the way that procurement was being conducted.

And what we have created, through CICA, is a police force that is not on the Government payroll who are concerned about fair procurement practices and policies and who now, with CICA, have a means of being heard and getting some relief.

So it has been extremely positive.

In terms of statistics, through March 4, 1986, some 181 protest actions have been filed. As I recall, in testifying before this committee when you were considering CICA, there were some people in the administration who were predicting literally thousands of protests a year. I think the facts show that CICA has not been misused.

Of the total of 181 actions, there have actually been 148 protests filed since the inception of CICA through March 4. Of those, they have disposed of 135. Their backlog is de minimis.

In terms of the disposition of the protests, 22 of them were granted, which means the taxpayer had a benefit. A bad procurement was recompeted or the specifications were changed so that more vendors could compete against that need. In some cases, the specifications were changed from make and model to a functional specification that described what the Government's job was and gave the vendor community an opportunity to propose to the Government a lot of different ways to get that job done more efficiently at less cost.

Seventeen of the protests were denied. So again, the GSA Board has worked very effectively at not allowing this to become a frivolous mechanism by which one vendor simply harasses another vendor.

Overall, as you look at the total statistics, 60 of the protests have been sustained in favor of the vendor and the taxpayer. Eighty have been sustained in favor of the procuring agency as having done its job well.

I daresay, without CICA, not only would we not have such statistics, but in the vast majority of the cases, the procurement was rammed through, the equipment was installed, and no matter how egregious it was, the procurement was essentially irreversible. There was no means available to stop the steamroller while the facts were developed and remedial steps taken.

Mr. **Brooks**. Mr. Biddle, you know it was our feeling on the subcommittee and on the committee, that such a board would be a very valuable protection for all the vendors who are bidding on the basis of merit and price and delivery. If you don't have a fix, or something rigged, you need a board to protect you from the people that do.

And that was our thought, that it would be a good, fair, and impartial agency. And apparently the Board has worked that way, up until now when there seems to be a dedicated effort to stop it from working. It is doing too well.

You know, if it works in the Government, they fight you. If it does not work, they want to fix it.

Mr. **Biddle**. I think there are some dichotomies here, when you look at the Packard Commission report, the need to expedite the procurement process, the need to open it up, and here we are turning around and taking—one more time—a simple, clear-cut piece of legislation and writing egregious regulations to implement it. Look at what the FAR drafters have attempted to do to CICA. A simple process has been turned into a nightmare.

And the taxpayers are not served by that, the vendor community is not served by that, and I do not think the agencies are served by it.

If GPO can move ahead with impunity and install the equipment and, once the courts and OMB and everybody have sorted all this out, GPO's response will be gee, we have already installed the equipment. The contract is substantially complete and, Mr. Chairman, we are sorry about that. And that is what has happened in the past all too often.

Mr. **Brooks**. We did that in the *Paradyne* case, do you remember?

Mr. **Biddle**. I remember that one.

Mr. **Brooks**. They just indicted the chief cook down there, and a lot of other people, too, were indicted. One of them has been convicted and is serving a little time. It warms your heart.

Mr. **Biddle**. We have talked about it before, Mr. Chairman, but again I keep seeing the rules, the regulations, and the mentality that have been developed to deal with complex weapons systems procurements creeping into the procurement of a simple, off-the-shelf piece of equipment. And I do not comprehend it.

Mr. **Brooks**. Now, Mr. Biddle, do you believe that the Board's order to suspend the GPO contract, pending resolution of the protest, was the right decision?

Mr. **Biddle**. We certainly cannot comment on the merits of the protest. But it has been our experience that there really have been no contracts that are so urgent that a 45-day delay will be counter to the interest of the American public or to the agency.

Mr. **Brooks**. Do you believe that the GSA Board is an effective forum to challenge agency contracting abuses?

Mr. **Biddle**. Well, contrary to the allegations of the original opponents to CICA, they have consistently been making their decisions within the 45-day deadline. They have been providing a forum which is keeping an awful lot of people honest, both vendors and procuring agencies.

We have found that the judges on the Board have a grasp of the technology of this industry, which frankly a lot of times even the contracting officers do not have. So we think it has been a very positive effect. It has not cost the industry or the taxpayers an inordinate amount of money to bring about a substantial improvement in the process.

Mr. **Brooks**. Mr. Horton, the gentleman from New York.

Mr. **Horton**. Thank you, Mr. Chairman.

Mr. Biddle, I want to commend you on your statement. I think it is one of the most clean, concise, clear-cut analyses of this problem that I have seen. You have pointed out that the bill that we passed, the Competition in Contracting Act, was an attempt to try to get a better fix on this problem of bid protest. I really think that is what we did have.

And you have pointed out, in your testimony, that the intervention of OMB can create some real nightmares as far as the ability of this Board to effectively do its job.

I want to emphasize what you said on page 5, because I think you said it very well. First of all, as you know, the President signed the bill and then the Attorney General, on his own, had declared it to be unconstitutional. Mr. Brooks and I both shared the same view, that we thought that that should have been a decision that was made by the courts, rather than by the Attorney General.

But apparently, in this case, the Attorney General did say that it was unconstitutional, and therefore instructed the OMB to issue orders that it should not be followed. And for a number of months they did that. And Mr. Brooks and I went over before the Bipartisan Leadership Group of the House and ultimately that group supported us unanimously. Counsel for the House of Representatives appeared in different cases and was successful in persuading Federal courts to uphold the constitutionality of that law.

Mr. **Brooks**. Twice.

Mr. **Horton**. Twice, they did it.

And then it was at that point that OMB backed down and said go ahead and follow the law. But then as you pointed out, although OMB subsequently backed down, its recent conduct shows it will continue to attempt to undermine the CICA bid protest system. And then you go on by saying that by reviewing the Board's jurisdiction over protested procurements, OMB is attempting to create a forum for reviewing Board decisions, which is contrary to CICA's review procedure. And it is. It is completely alien to what we had in that legislation.

Mr. **Biddle**. That is correct.

Mr. **Horton**. And you put your finger right on the point that has to be, as a matter of fact, the main thrust of this hearing. And that is that we just cannot tolerate that type of thing to happen.

Mr. **Brooks**. Would the gentleman yield?

Mr. **Horton**. I would be happy to yield.

Mr. **Brooks**. Do you think we might, at this time, put an excerpt of what the judge said on two occasions about the Justice Department's position. It was crystal clear that he had a minimum high regard, as has been said, for the judicial position maintained by the Justice Department. And he just tore them into little ribbons about that wide.

Mr. **Horton**. It would be helpful, especially in view of this testimony.

[The information follows:]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 85-1064

AMERON, INC.,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,
LT. COL. MICHAEL K. COLLMEYER,
CONTRACTING OFFICER
UNITED STATES OF AMERICA, and
SPINIELLO CONSTRUCTION COMPANY,

Defendant.

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MEMORANDUM OPINION

Newark, New Jersey
March 27, 1985

BEFORE: The Honorable HAROLD A. ACKERMAN, U.S.D.J.

In the statutorily required notification to the Senate that the Department of Justice was instructing executive agencies not to comply with the stay provisions of CICA, the Attorney General of the United States stated: "[T]he Department's decision to advise Executive Branch agencies not to execute the unconstitutional provisions will best assure a rapid and definitive judicial resolution of these constitutional issues. Any bid protester who is aggrieved by an Executive agency's failure to comply with these provisions may raise the constitutional issues for judicial resolution." Letter from Attorney General William French Smith to Vice-president George Bush, November 21, 1984, at 10. The Acting Deputy Attorney General recently reiterated that the goal of achieving "a speedy judicial resolution of this question" underlay the Department's directive that agencies disobey the law. See, Prepared Statement of Acting Deputy Attorney General D. Lowell Jensen Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations Concerning Competition in Contracting Act of 1984, March 7, 1985, at 10.

In spite of these assurances, the litigating posture of the executive defendants in this case seems to be one designed to avoid a judicial resolution of the lawfulness of agencies' conduct in continuing to disobey the law. This court rejects defendants' attempt to insulate their actions from judicial review. It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

I turn then to the question of whether the provision of CICA which allows the Comptroller General to lift stays by rendering decisions on bid protests is constitutional.

I note at the outset that consideration of whether "to declare an Act of Congress unconstitutional ... is the gravest and most delicate duty that th[e] Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring). "Every possible presumption is in favor of the validity of a statute." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 355 (1936) (Brandeis, J., concurring)(quoting *The Sinking Fund Cases* 99 U.S. 700, 718 (1878)).

Defendant contests the CICA provision at issue because it vests in the Comptroller General, a legislative official, executive powers which result in the alteration of legal rights, duties and relations of persons outside of the legislative branch and is therefore inconsistent with the separation of powers principle. *INS v. Chadha*, *supra*, at 2764.

Plaintiff contends that CICA is constitutional because the Comptroller General is an "Officer of the United States" as that phrase is used in the Appointments Clause, Art. II, Section 2, cl. 2, of the Constitution. Thus, he may perform all duties that Congress may statutorily assign officers of the United

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 85-1064

AMERON, INC., :
Plaintiff, :
-vs- :
U.S. ARMY CORPS OF :
ENGINEERS, et al, :
Defendants.

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
May 28, 1985

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

MEYNER & LANDIS, ESQS.
BY: THEODORE I. BOTTER, ESQ.
For the Plaintiff

D'ALESSANDRO, SUSSMAN, JACOVINO & MAHONEY, ESQS.
BY: BRIAN E. MAHONEY, ESQ.
For Spiniello Construction Co.

CHARLES TIEFER, ESQ.
For Speaker of the House of Representatives
and Bipartisan Leadership Group

MORGAN FRANKEL, ESQ.
For the U.S. Senate

W. HUNT DUMONT
UNITED STATES ATTORNEY
BY: EDWARD SPELL
Assistant U.S. Attorney
For U.S. Army Corps of Engineers

PURSUANT TO SECTION 753 TITLE 28 UNITED STATES CODE THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN STENOGRAPHICALLY IN THE ABOVE ENTITLED PROCEEDINGS

Thomas F. Brazaitis
THOMAS F. BRAZAITIS C.S.R. OFFICIAL COURT REPORTER

unconstitutional (such as by declining to defend the statute in a court challenge) and *deciding* that a law is unconstitutional. See, for example, the letter of February 22, 1985 from Attorney General William French Smith to the Honorable Peter Rodino, Jr. when the then Attorney General stated that "the Executive Branch's decisions not to execute or not to defend a statute are inextricably intertwined."

The Acting Deputy Attorney General then testified before the House Committee on Governmental Operations on March 7, 1985, that "the President's duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land."

See "Testimony of D. Lowel Jensen, reprinted in a volume entitled *Constitutionality of GAO's Bid Protest Function, Hearings Before a Subcommittee of the House Commission on Government Operations*, 99th Congress, 1st Session (1985) at pages 302 and 318.

In April of this year, the Attorney General of the United States, the Honorable Edwin Meese, III, again so testified before the House Committee on the Judiciary, and again in April, again so stated in a public letter to the New York Times, (see the letter of May 21st, 1985, entitled "President's Right to Challenge a Law"), which the House intervenors have attached to their brief.

The present Attorney General has specifically assailed the jurisdiction of this Court in this case. In testimony on April 18, 1985, before the House Committee on the Judiciary, Attorney General Meese stated that this Court's decision of March 27 was not being followed because the Executive Branch was waiting until a court competent to decide the constitutionality of the law had decided the issue.

Such a position by the Executive Branch, I find, flatly violates the express instruction of the Constitution that the President shall "take care that the Laws be faithfully executed." United States Constitution Article II, Section 3. It has been one of the bedrocks of our system of government that only the Judiciary has the power to say with a the law is. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The Executive Branch's position that they can say when a law is unconstitutional equates the powers of mere executive officials with those of the Judiciary. It flies in the face of the basic tenet laid out so long ago by the United States Supreme Court in United States v. Lee, 106 U.S. 196 at Page 220, (1882). The Court said, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

The rule that no executive official can decide for himself what laws he is bound to obey, but must await decisions of the Judiciary and until then must obey the laws, has deep roots in our constitutional history. As explained in Mr. Tiefer's presentation to the House, which is in the House Hearings Bulletin previously cited at page 257. During the reign of absolute British monarchs, the notion that the Executive, at the time the King, could decide for himself, without a decision of the courts, which laws should be obeyed was put to the test.

As Mr. Tiefer correctly noted, "After the Restoration, King James II attempted to claim such authority, but the English people would no longer tolerate such a claim, and their judicial system rejected it in the historic Seven Bishops Case of 1688.

"Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared 'That the pretended power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal.' Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the suspending power," that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending'.

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"In fact, the Constitutional Convention in 1787 expressly rejected the attempt to re-introduce some power for the President to decide to suspend the execution of laws. In that summer of 1787 Mr. Elbridge Gerry, a Delegate, observed, after a proposal was made at the Philadelphia Convention, "that the national executive have a power to suspend any legislative act. . ." He noted, "that the power of suspending might do all the mischief dreaded from the nevative of useful laws [i.e., the President's veto], without answering the salutary purpose of checking unjust or unwise ones."

. The Constitutional Convention, I note, rejected the proposal. "Mr. Tiefer noted, "If the Framers had intended to give the President any such awesome power of deciding the constitutionality of laws as they gave to the Judiciary, there clearly would have been a clear record of it. Yet Alexander Hamilton, who discussed in detail the authority of the Judiciary to decide the constitutionality of laws, provided no such discussion of the supposedly equivalent Presidential power.

"Any possible doubt about the matter was resolved in the historic case of *Kendall v. United States*, 37 U.S. (12 Pet) 524 (1838). There, a Cabinet Member claimed that because he was subject to the President, who, in turn, supposedly derived a vast power from the 'faithful execution' clause, he was not bound by the laws.

"The Supreme Court utterly rejected any such argument of Executive supremacy. The Supreme Court said that 'to contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.'

"That Court," Mr. Tiefer noted, "harkened directly back to the classic language of the English Bill of Rights, and the Framers in a Constitutional Convention, in rejecting Executive power to 'forbid [the] execution' of the laws.

"In rejecting the Executive's argument, the Court explained that the effect of such power would be the 'vesting in the President [of] a dispensing power, which has no countenance for its support, in any part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."

More recently the Supreme Court reaffirmed the distinction between the Executive Branch's right to express views on the constitutionality of a law and the Judiciary's right to decide the constitutionality in Immigration & Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983).

I thus reject any attempt to characterize this Court as incompetent to make binding decisions of constitutional law and I order all parties, specifically the Executive Branch, to follow any ruling I make in this case in this district in which I am sitting. And that refers also to the Honorable Casper A.

Weinberger and the Honorable David Stockman.

I, and the members of the Executive Branch of the Government have taken an oath to execute and fulfill the duties of my office according to the Constitution and laws of the United States. I believe I adhered to that oath and I would expect no less from members of the Executive Branch of the Government, regardless of what their station is within that Branch.

I order them to uphold that oath with respect to following this Court's order, which remains legally viable in this district until overruled by an appellate court.

I now turn to the parties' cross-motions for summary judgment as to the constitutionality of the act.

Defendants rely on the arguments submitted in opposition to the motion for preliminary injunction and supplement those arguments with additional case law discussing the position of the Comptroller General. Defendants continue to assert that the Comptroller General is part of the Legislative Branch.

I have carefully reviewed defendants' additional theories as to why the Comptroller General cannot constitutionally carry out the duties assigned to that office under the Competition in Contracting Act and find them to be as unpersuasive now as I found them on the motion for preliminary injunction. United States Supreme Court case law clearly

Mr. **Brooks**. They are back at it again, the same thing.

Mr. **Horton**. The concern I have is that they are going to prostitute this whole process. I think it is a very important ingredient of this whole problem of protests to have it expeditiously determined.

You know, I have been involved in this procurement process for many, many years. I served on a procurement commission. And it is sad how we have to climb wall after wall, after wall after wall to get any type of objective.

And I thought we had the problem solved when we put this bill in. And now all of a sudden we find OMB is jumping in and creating all kinds of dirty water. And as you very succinctly point out, if this continues, we might as well forget it.

Is that generally what your view is?

Mr. **Biddle**. Yes, Mr. Horton. I think, as you may recall, during the original hearings on CICA you asked me a question as to whether this bid protest process would substantially slow down procurements. And at that time I used the analogy that if you put a 45-mile-an-hour speed limit on the GW Parkway and people continue to ignore it and get ticketed, it will slow them down while the ticket is being written, but they will finally get the message.

And as we have seen, the actual facts are in CICA, the bid protest process has not slowed things down, it has improved things. And I sense that somebody wants to take the cops off the beat and get back with the 95-mile-an-hour run down the GW Parkway.

You know, one of the things that worries me is that we saw CICA as an experiment, as a means of improving Federal procurement policy. It was limited, in this incarnation, to ADP. The thing that worries me is whether the administration is fearful that we might get Federal procurement improvement outside of ADP, that CICA will work so well that the Congress might decide that perhaps this ought to be spread to many other agencies and procurements.

Mr. **Horton**. That is a novel thought and maybe we ought to pursue that.

I have a couple of questions that have to do with the exemption from the Brooks Act. GPO has maintained its 600–S procurement is exempt from the Brooks Act because it is for printing. What would be the consequence of ADP procurement if agencies were free to exempt their purchases from the Brooks Act review on the ground that the purpose of the acquisition is something other than ADP itself?

Mr. **Biddle**. I could hear IRS saying that the purpose of the several tens of thousands of lap top computers they just bought was accounting and not ADP.

Mr. **Horton**. In other words, if we allow this precedent to be set, this might be a way to get around the Brooks Act just by agencies just independently making their own decisions, right?

Mr. **Biddle**. That is correct. The definition of words changes over time, but I think the concept of what the Brooks Act was addressing has not changed with the terminology or the technology.

Mr. **Horton**. I thought it was pretty clear, but apparently we are getting some problems on that.

What is your interpretation of the role that OMB has under the Brooks Act, with respect to ADP procurements?

Mr. Biddle. Essentially, it is one of resolving disputes between the agencies when they occur and that is a proper role for them to perform. But that is not the case in this issue before us today.

Mr. Horton. Do you believe that OMB's role can be construed to provide them with the authority to determine the scope of the Brooks Act where a protest is involved?

Mr. Biddle. Mr. Horton, I think the Congress decides the authority of an act of law and not OMB. The courts may interpret, but I think we have one more instance here where an agency of the executive is trying to decide what the Congress meant, and that is not their role in our system.

Mr. Horton. Mr. Biddle, again, I want to thank you. I think your testimony is probably some of the best testimony I have seen on this subject anyplace.

Thank you.

Mr. Brooks. Thank you.

Mr. DioGuardi.

Mr. DioGuardi. I will pass now.

Mr. Brooks. Mr. DeLay.

Mr. DeLay. No questions. Thank you, Mr. Chairman.

Mr. Brooks. We will go on to our next witness. Our next witness is Harry R. Van Cleve, general counsel for the U.S. General Accounting Office.

Late last week, the GAO was asked to perform a legal review of three specific issues of deep concern to the subcommittee. Given this short timeframe, their testimony today will be limited solely to those issues, which we understand.

Mr. Van Cleve, we appreciate your coming out today. Your testimony will be made a part of the hearing record. You may continue.

STATEMENT OF HARRY R. VAN CLEVE, GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY SEYMOUR EFROS, ASSOCIATE GENERAL COUNSEL

Mr. Van Cleve. Thank you, Mr. Chairman. Mr. Chairman and members of the committee. Mr. Seymour Efros, the associate general counsel of GAO, is with me this morning.

As you have noted, we have begun at the committee's request to look at some of the issues involved in this particular procurement. We are not yet concluded and won't be through for a while.

We had an earlier contact with this procurement because we received a protest from AT&T against it. Noting that Xerox and Volt had already protested to the GSA Board, we dismissed the AT&T protest under our procedures which say if a matter has gone to the GSA Board we will dismiss it in GAO. We dismissed it with the right on the part of AT&T to refile it and not be met with an untimeliness argument in case the GSA Board were to decide it did not have jurisdiction. We didn't want the parties left without a remedy.

We have, at your request, this week, looked at these issues of jurisdiction. While we don't have absolutely definitive and clear-cut answers, we have some answers we would like to share with you today.

We look at it this way; the first question appears to me to be whether the Government Printing Office is subject to the Brooks Act at all. In the beginning, in 1965, when the Brooks Act was passed, the Government Printing Office then was not subject to the Federal Property and Administrative Services Act. The Brooks Act specifically removed that exemption from GPO and made it subject to the Brooks Act provisions.

In 1977, there was an exemption in the Appropriation Act for GPO which removed the applicability at least for that year of the Brooks Act to the funds used in that appropriation.

Mr. Brooks. You said for that year?

Mr. Van Cleve. Yes. I guess you have anticipated my conclusion, Mr. Chairman. My conclusion really is that all things considered, we believe that was an exclusion for 1977 only. It was not one that had words of futurity in it. In fact, we think that the testimony in 1978 by the Public Printer, in which he asked for permanent renewal of that exemption, and that it be made permanent, indicates that the Public Printer himself believed that he did not have more than a 1-year exemption.

We understand that the Department of Justice has argued to the contrary in the district court. We have seen its brief. We didn't hear the argument. By and large, we think there is not too much question here. We think that the Government Printing Office is subject to the Brooks Act generally.

The second question is one on which we have a little less information. That is whether this particular procurement, the Army procurement, is one subject to the Brooks Act.

We have reviewed the RFP. The procurement requires the provision of a very substantial number of general purpose computers. That being so, one would normally expect that the Brooks Act requirements would apply. It also does appear that the Army is buying printing services. We know that title 44 requires that all printing services be obtained through the Government Printing Office.

Computers are these days an important part of printing services as computers are an important and growing part of almost any form of manufacturing and services. We do note that the General Services Board's Administrative Judge did not address this question but asked that it be presented to him in briefs and arguments. We have read his opinion. We don't know the facts that will come out presumably if they are permitted to proceed.

The GAO position is that while we don't see any definitive clear-cut answers here, we believe there is enough present in front of us to suggest that there would have to be a very substantial showing that the Brooks Act is inapplicable to this procurement, to lead us to believe it is. It would appear to us on what we have so far that this is the kind of procurement to which the Brooks Act applies. We would have to be shown facts that we have not yet got before us to indicate it might not be.

There is a third and somewhat technical point that I would address with even less assurance, and that is who determines the GSA Board's jurisdiction. Both the Brooks Act itself and the Competition in Contracting Act do have language which bears on this issue. We don't find that it is absolutely totally resolved in that language.

One reason why we haven't pursued it too hard is because the issue appears to be before the Federal circuit through the actions of the parties in having brought this case to them. We presume that the courts will resolve this question in due course. Since we think they will, we think we might as well leave it to them to do so.

As the chairman has commented in his comments earlier today and Mr. Horton also, we have ourselves been the subject of OMB and Department of Justice views on constitutionality and legality, which in fact they were required or I guess they felt they were required—they did in fact—withdraw when the courts ruled they were wrong.

That being so, we are even more than usual in favor of the rule of law. Therefore, we would prefer this issue simply be resolved in the courts. We think it probably will be.

That is the limit of what I had prepared to say. I would be glad to try to answer any of your questions, Mr. Chairman.

Mr. **Brooks**. You have answered them very well. I might point out as author of both the Brooks Act and coauthor, along with a lot of other people including Mr. Horton, of the Competition in Contracting Act, there was no intention by us or by Congress at that time to give the budgeteers and political appointees at OMB, whether they were appointed by Republicans or Democrats, it doesn't make a bit of difference—the con men like to operate in all administrations—to give OMB the right and power to sit in final judgment on the legal rights of private parties. It never entered our minds and it is not part of our understanding or the intent of the legislation.

I want to insert into the record at this time a letter signed by myself and Mr. Horton dated January 29, to Mr. Bowsher, your Comptroller General.

[The letter follows:]

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Congress of the United States
House of Representatives
COMMITTEE ON GOVERNMENT OPERATIONS
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MAJORITY—225-5051
MINORITY—225-5074

January 29, 1985

The Honorable Charles A. Bowsher
Comptroller General
General Accounting Office
Washington, D.C. 20548

Dear General:

As you know, we have long worked towards a procurement process whereby the government obtains the best products at the best prices. In order for this to occur, each procurement must be conducted in a fair, equitable and judicious manner. Each contractor, win or lose, must feel that he has been given a fair shot at winning the contract. Unfortunately, more and more cases of favoritism, conflict of interest, and fraud are coming to the attention of the Committee. This is a disturbing trend and, in our view, each must be fully investigated to determine if criminal or civil remedies are warranted.

We have recently learned of serious allegations concerning a procurement being conducted by the Government Printing Office (GPO) for the Department of the Army, the 600-S project. These allegations suggest that a number of irregularities may have occurred in the award of this contract to Electronic Data Systems (EDS). These allegations include (1) the use of GPO by the Army to circumvent the Brooks Act (P.L. 89-306); (2) bid prices being dramatically changed by one of the competitors after best and final offers were received; (3) test scores being changed which benefited EDS; (4) proposals being changed after award; and (5) conflicts of interest, in that an Army employee who worked on the request for proposals was hired by EDS and subsequently returned to the Army in his same position prior to award.

While this procurement has generated a series of bid protests to both the GAO and the GSA Board of Contract Appeals which should proceed, we believe an immediate investigation should be initiated by GAO to determine if the above allegations are in fact true and what, if any, laws have been violated. Due to the serious nature of these allegations, we also request that sworn statements be taken as was done in the highly successful Deloitte Haskins & Sells review. Your investigation should be completed no later than July 15. Enclosed for your information are the letters we have sent to Inspectors General Sherick and Blalock asking that they take steps to protect all important documents and information regarding this procurement pending completion of the investigation. Thank you for your continued cooperation.

Sincerely,

Jack Brooks
JACK BROOKS
Chairman

Frank Horton
FRANK HORTON
Ranking Minority Member

Mr. Brooks. The letter points out that we have asked you to take a look at this whole procurement operation, particularly the allegations which include: the use of GPO by the Army to circumvent the Brooks Act; the bid prices being dramatically changed by one of the competitors after the best and final offers were received; the test scores being changed which benefited EDS; the proposals being changed after the award; and conflicts of interest regarding an Army employee who worked on the requests for proposals and then was hired by EDS and subsequently returned to the Army in his same position prior to the award.

Those are just the allegations that have been brought to our attention so far.

If they charge them with changing the prices after the best and final offers of everybody else's has been in—that is called the last look—if they did that, that is a brother-in-law deal that is bad. AT&T is not what you call a virgin in the marketplace, as you know. [Laughter.]

Mr. Van Cleve. Mr. Chairman, as you know, we have begun to look at those questions in response to your request. We have an audit team gathered.

Mr. Brooks. We look forward to the earliest and full evaluation of that request.

Mr. Van Cleve. May I comment very briefly on the earlier part of your statement? I was general counsel at GSA in 1965 when the Brooks Act was passed. In thinking back and remembering——

Mr. Brooks. You were the only people for it. Do you remember that?

Mr. Van Cleve. Yes. I think maybe that is true. Indeed, I do.

Mr. Brooks. Do you remember all the agencies that were against it?

Mr. Van Cleve. Yes, I remember it.

Mr. Brooks. They changed their minds, some of them. They had a problem with their arms, but they got somebody to sign their name. Their arms had been changed a little bit. Their left arm was put where their right arm was. Then they decided it wasn't such a bad bill. They had planned to kill it.

Mr. Van Cleve. I remember the reasons why, as nearly as my memory serves me now, the OMB was inserted into that provision of the Brooks Act which said it could resolve policy and budgetary fiscal questions. It is the one in fact expressed in the language of the Brooks Act that deals with whether uses by agencies of the ADP to be purchased would be controlled by GSA.

There was a concern that GSA through its central buying authority would control the uses to which agencies were to put ADPE. Second, there was a concern that through its central buying authority, GSA would control the requirements for ADPE that the agencies felt they had. It was clearly understood by the Congress, I think, and certainly by this committee, that the agencies were to be free to resolve what they needed by way of ADPE and having it, how they were going to use it.

In the event of a dispute on those issues, OMB was asked to be an arbitrator. I don't see anything in the Brooks Act which suggests that it was asked to be an arbitrator of the kind of dispute which has arisen in this particular procurement. That isn't to say that the 1965 law can anticipate every possible future problem. Maybe it did not.

I do remember why OMB was put there. I hope my memory is the same as yours. I am pretty clear those were the reasons why OMB was inserted in that language, to resolve that kind of issue.

Mr. **Brooks**. That's pretty close. Mr. Horton.

Mr. **Horton**. Thank you, Mr. Chairman. As was pointed out in the testimony by Mr. Biddle and his answers to the questions I asked of him, there is certainly no question that the Competition in Contracting Act did not put OMB in any of that bid protest procedure.

Mr. **Van Cleve**. No, sir. There is nothing whatever in the Competition in Contracting Act that gives OMB a role in the bid protest procedure.

Mr. **Horton**. I would certainly feel, as Mr. Biddle very capably pointed out in his testimony, that by their intervention in this type of a dispute, if you want to put it very clearly and understate it, they can muddy up the water and create a situation in which that bid protest procedure will be really worthless.

Mr. **Van Cleve**. I think it is very important that the bid protest procedure be able to work unimpeded. It ought to be clear and it ought to be as it has been both under the GAO procedures and under the GSA Board procedures, prompt and quick to operate. If it takes a long time, its value becomes very considerably less, as we knew in fact before CICA was passed.

Mr. **Horton**. I don't have any further questions. Thank you very much. We will be looking forward to the report on the questions Mr. Brooks referred to in the letter he and I signed to the Comptroller General.

Mr. **Brooks**. Mr. DioGuardi.

Mr. **DioGuardi**. No questions, Mr. Chairman.

Mr. **Brooks**. Mr. DeLay.

Mr. **DeLay**. No questions, Mr. Chairman.

Mr. **Brooks**. Thank you very much, counselor, and Mr. Efros.

Our next witness is Mrs. Wendy Gramm, Administrator for the Office of Information and Regulatory Affairs, Office of Management and Budget. Dr. Gramm is accompanied by Robert Bedell, the Deputy Administrator.

We thank you for being with us this morning. Your testimony will be made a part of the record. You may proceed as you see fit.

STATEMENT OF DR. WENDY GRAMM, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY ROBERT BEDELL, DEPUTY ADMINISTRATOR

Dr. **Gramm**. Thank you, Mr. Chairman. We do not have a prepared statement this morning.

As you may know, we were asked early last month by the Public Printer, GPO, to resolve a dispute between GPO and GSA, concerning a particular contract, whether or not it fell under the Brooks Act jurisdiction.

We had hoped to have had some conclusions by today and thereby could report on them to you. As we indicated to your staff this

Monday, when you requested our presence at the hearings and again yesterday afternoon, we have not drawn our conclusions. We have not concluded our review yet. Therefore, we do not have a position to state for you this morning, and I do not have a prepared statement.

I wanted to be responsive to your request to be here. I will be happy to answer what questions I can answer. We have not concluded our review yet. There are many issues that have been raised and they are difficult ones. There are some issues that have been raised by yourself and Mr. Horton in a letter that we received yesterday that we would like to consider in making our decision as well.

We expect we will be able to conclude our review within the next few days.

I have with me Mr. Robert Bedell, who is my Deputy Administrator.

I would like to say just one thing for the record and that is, Mr. Chairman, in making the decision, we want to carry out the authorities under the Brooks Act and CICA. We do not expect to go beyond those authorities in any way.

Mr. BROOKS. I would be delighted to give you some ideas on what I think the scope of the Brooks Act is.

Dr. GRAMM. I would be delighted to hear it.

Mr. BROOKS. I would be delighted to share it with you. Although you indicated that you might have a decision on it yesterday, apparently it is going to be a few days before it is available.

Dr. GRAMM. It will be a few days.

Mr. BROOKS. Maybe we can have another hearing but I hope it is not necessary.

Dr. GRAMM. We hope to conclude our review and we would be happy to come up and discuss it with you once that review is completed.

Mr. BROOKS. What specific statutory authority did you feel gives OMB the right, any right, to interject itself into the proceedings of the Board of Contract Appeals?

Dr. GRAMM. That is one of the issues we are certainly addressing. That is: Do we have the authority; what exactly is the scope of our authority; exactly what issues are we going to address as well as what issues are we not going to address in our determination. We want to review these issues carefully in making our decision.

Mr. BROOKS. When you do that, I wish you would consider that the bid protests that OMB is reviewing were brought by private vendors under the Competition Act. The Government Operations Committee report, which accompanied the Competition Act, states very clearly, and I quote:

> The resolution of disputes . . . between procuring agencies and suppliers or potential suppliers shall be decided solely by the Board . . . under procedures established by this bill.

I think if you all take a look at that, you will understand it. They are to determine the procedures under which the purchase is made. They are willing to do that. We are not trying to decide in this committee meeting the substantive issues between EDS, Volt, AT&T, and Xerox; all big monsters, as far as I am concerned. They are fighting the award and I think they ought to have a forum in which to resolve their differences and hopefully in the public interest.

Dr. **Gramm**. Very frankly, it is my view that OMB is not a contract dispute resolution agency.

Mr. **Brooks**. Right. They are not.

In making your determination on this bid protest, what procedures have you followed to ensure some legal due process would be given to the affected parties and that a fair and equitable decision is reached?

Dr. **Gramm**. I believe they have that due process as specified under the acts and in the courts as well.

Mr. **Brooks**. You understand, as you said, you don't think OMB should resolve these disputes finally and I can fully agree with that. Judicial forums have elaborate procedures governing the review of legal matters, the rules regarding ex parte communications, rules providing for discovery by parties to get at the truth, and an opportunity for both oral and written presentations. OMB does not have these procedures. They are legal procedures to protect due process.

Dr. **Gramm**. We do have some procedures. For example, neither Bob or I are speaking to outsiders on these particular issues while we are reviewing the issues at hand. However, it is not our view that we are here to review the contract issues.

Mr. **Brooks**. That is the best statement I have heard. Would you explain what avenue of appeal, if any, would exist, if you agree OMB had it for some reason? How would the injured party ever get to a court if OMB resolved it—Mr. Bedell? You can pass that one along either way. You can pass them. If they are hard, dump them. [Laughter.]

Mr. **Bedell**. I shall do that.

Mr. **Horton**. You can just say that you are studying the matter.

Mr. **Brooks**. We will prepare an answer for you and submit it. It is still under consideration or we have a committee working on it. That is the Defense Department's story. They have a committee working on everything in the world right now.

Go ahead, Mr. Bedell. I was just giving you time to think. [Laughter.]

Mr. **Bedell**. Thank you. I think I need more time to think.

Mr. **Brooks**. You need more time? Do you want me to light a cigar or do something else? [Laughter.]

Mr. **Bedell**. We are not resolving the bid protest even in these cases. The only things we are considering right now are really three separate requests made under section 111(g) of the Federal Property and Administrative Services Act, which is the authority that was referenced by Mr. Van Cleve, which seems to require that we make some kind of determination in the event of disagreement between agencies with regard to their procurement of ADP equipment. That is the only thing that we are considering.

It raises a whole variety of issues, including whether we have the jurisdiction to make that determination in this case. We are not resolving the dispute or the bid protests. No protests have been lodged with us. We are not the forum for resolving bid protests, as Dr. Gramm stated.

The procedures that we have put in place that she described are procedures to make sure there are not any allegations that we were talked to or influenced in making the decision under section 111(g). It is not designed to be any kind of a judicial set of procedures. It is just one we have imposed upon ourselves.

Mr. **Brooks**. Maybe your decision, if you can clarify that, is not supposed to obstruct or delay the Board's decision on the substantive issues being raised by the various vendors.

Mr. **Bedell**. As you know, we have not——

Mr. **Brooks**. I know you haven't yet. I want to be sure you don't.

What role did the Office of Information and Regulatory Affairs have in reviewing the Board's decisions in this bid protest so far?

Mr. **Bedell**. We have not reviewed any Board decisions in this case or any other case.

Mr. **Brooks**. I would be less than candid if I didn't tell you that one of the important responsibilities given the OIRA has been to promote sound ADP procurement practices. Since its creation—before your time there, it didn't happen on your watch, but it is still happening on your watch—since that creation and in its continuing efforts, OMB and your office have pretty much ignored their ADP responsibilities.

The authorization for the office expired in September of 1983. It has concerned me a lot. They do not have the money authorized and are spending it illegally and not in accordance with what Congress said was their job and what Congress laid out. They put it in their budget but they don't have it in their itemized request for appropriations.

You understand how this $4 to $5 million gets in the budget. That is the way they have been doing it. I have written letters which I will put in the record at this point to Jamie Whitten, chairman of that committee, and Mr. Roybal of the subcommittee, requesting funds from the office be deleted from the 1987 appropriations and not restored until the reauthorization legislation is passed. There is no basis for it, particularly at a time when we have a substantial deficit. We ought not be spending money for activities for which there is no authorization.

[The letters follow:]

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House of Representatives
COMMITTEE ON GOVERNMENT OPERATIONS
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MAJORITY—225-5051
MINORITY—225-5074

March 4, 1986

The Honorable Jamie L. Whitten
Chairman
Committee on Appropriations
H218, The Capitol
Washington, D.C. 20515

Dear Mr. Chairman:

As you know, I have long been concerned over the Office of Management and Budget's (OMB) failure to carry out its mandated responsibilities under the Paperwork Reduction Act of 1980 (P.L. 96-511). Specifically, OMB's Office of Information and Regulatory Affairs (OIRA), created for the sole purpose of administering the Act's requirements, has concentrated its efforts on the President's regulatory reform program rather than the functions assigned to it under the Act. This is particularly true in the ADP and telecommunications area where it has shown little interest in ensuring that the government agencies fulfill their ADP requirements in an economic and efficient manner. As a result of this and other deficiencies, the significant and far-reaching reforms envisioned by the Congress in passing the Act have been jeopardized.

Recognizing these problems, the Committee initiated legislation (H.R. 2718) in 1983 to reauthorize OIRA and to require the Office to concentrate its resources on the functions assigned to it by the law. H.R. 2718 passed the House on November 7, 1983, but a companion bill was not acted upon by the Senate prior to adjournment of the 98th Congress. Since that time, OMB has not sought to renew the charter of the Office, and OIRA has been operating without an authorization for more than two years.

The President's FY 1987 budget request contains $5.408 million to fund OIRA's operations for the coming fiscal year. Since the Office has been operating without an authorization, and OMB apparently has lost sight of Congress' intent in passing the Paperwork Act, I strongly believe that further funding of these operations at this level is unwarranted. Therefore, I request that your Committee reduce OMB's 1987 Appropriations bill by the amount of $5.408 million and consider no further funding for OIRA until the office is reauthorized by Congress. Your support in this matter is greatly appreciated.

With best wishes, I am

Your friend
Sincerely,
Jack Brooks
JACK BROOKS
Chairman

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MAJORITY—225-5051
MINORITY—225-5074

March 4, 1986

The Honorable Edward R. Roybal
Chairman, Subcommittee on Treasury,
 Postal service, and General Government
H164, The Capitol
Washington, D.C. 20515

Dear Mr. ~~Chairman~~ Ed:

As you know, I have long been concerned over the Office of Management and Budget's (OMB) failure to carry out its mandated responsibilities under the Paperwork Reduction Act of 1980 (P.L. 96-511). Specifically, OMB's Office of Information and Regulatory Affairs (OIRA), created for the sole purpose of administering the Act's requirements, has concentrated its efforts on the President's regulatory reform program rather than the functions assigned to it under the Act. This is particularly true in the ADP and telecommunications area where it has shown little interest in ensuring that the government agencies fulfill their ADP requirements in an economic and efficient manner. As a result of this and other deficiencies, the significant and far-reaching reforms envisioned by the Congress in passing the Act have been jeopardized.

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The President's FY 1987 budget request contains $5.408 million to fund OIRA's operations for the coming fiscal year. Since the Office has been operating without an authorization, and OMB apparently has lost sight of Congress' intent in passing the Paperwork Act, I strongly believe that further funding of these operations at this level is unwarranted. Therefore, I request that your Subcommittee reduce OMB's 1987 Appropriations bill by the amount of $5.408 million and consider no further funding for OIRA until the office is reauthorized by Congress. Your support in this matter is greatly appreciated.

With best wishes, I am

Your friend,
Sincerely,
Jack Brooks
JACK BROOKS
Chairman

Mr. **Brooks**. I have one other question. Did you all attempt to influence or pressure the GSA officials in removing their support for the Board?

Dr. **Gramm**. No, sir.

Mr. **Brooks**. GSA's position, which was very clearly stated, was that they felt the GPO procurement does fall under the Brooks Act and that it did believe their Board had jurisdiction.

I have a couple of other questions that I will submit to you that are not too difficult, in the interest of time, and I will go to Mr. Horton. Thank you very much.

Mr. **Horton**. Thank you, Mr. Chairman.

Ms. Gramm, I want to welcome you to the committee. We are happy to have you here. We know you are doing an excellent job in your role as Administrator of the Office of Information and Regulatory Affairs. I want to commend you for that.

Dr. **Gramm**. Thank you.

Mr. **Horton**. The most important part of your office's responsibility is to make certain that the Paperwork Commission recommendations and the Paperwork Reduction Act are adhered to and that we make progress in that. This is a very important function of your office. I certainly want to see that is continued and maintained. I hope this type of thing here is not going to create any problems as far as that oversight is concerned and that work that you do. That is a very important responsibility to make certain that office is functioning and that you are making sure that the Paperwork Reduction Act is being carried out and we are actually making some reductions in paperwork.

We can save billions of dollars a year, as you know. I am very impressed with the reports you have made to me so far.

I have a series of questions here. I don't know that it is necessary for me to go through all of these. I think I have made perfectly clear my position. I hope you will take a copy of the testimony of Mr. Biddle and look at it very carefully.

It is my view that any time you get involved in something like this, especially when there is already a protest filed, you create a problem for that Board, which ought not be created. You are going to have to lean over backward, it seems to me, to keep from getting involved in the bid protest procedure.

I think my comments were very clear that I was very concerned about that. I hope that you will avoid that pitfall. You should not get involved in that judicial process. The Competition in Contracting Act is very clear that the next step goes to court, not to OMB. OMB ought not to intervene in any way. I hope that will be the basis on which you are going to look at this question that is before you now.

Dr. **Gramm**. Congressman Horton, let me just say that I think your points are well taken. Certainly I have the testimony of the people before me that I will take with me.

I would like to mention that the issues of the Paperwork Reduction Act and those parts of the office that I am responsible for are areas of great interest and concern to me.

Mr. Chairman, you mentioned our information policy role with respect to computers. Those areas are important to me. It is my view that we would like to deal with this particular issue as expeditiously as possible and go no further than what we are authorized to do and what our responsibility is under the acts.

Mr. HORTON. I would hope that you would wash your hands of this whole thing and I am not telling you what to say. I hope you will take into consideration the fact that there has already been a protest filed. You certainly ought not to get involved or I would hope you would come to that type of a conclusion, that you don't want to muddy up the water in that bid protest process.

An earlier witness criticized OMB for intervening in a protest procedure. The CICA pointed out that a party in a protest could interrupt any action before the Board by seeking an OMB decision on the Board's jurisdiction. This could greatly delay the Board's decision, a decision which CICA requires to be made within 45 working days after the protest is filed.

We do not want to have anything that is going to create a delay in that. It would seem it is pretty clear that you can intervene when there are questions between agencies. I do not think that is what is raised here. I would hope that you would come to that conclusion.

I will make available to you some of the questions that I have here and perhaps by those questions—you can reply to those in writing—they will further expand on what my views are.

I would hope that especially having the difficulty we have had with the Competition in Contracting Act, I would hope that the administration is wholly in support now, that they backed away from that direction that was given by the Attorney General that agencies were not to comply with that particular part of the Competition in Contracting Act.

I would hope that now is something behind us and we are not dealing with that any more. We are free and clear of that. The decision has been made that bill is constitutional and it has been so determined in the courts. The President did sign the bill. We don't have that problem any more.

I would hope we are not going to do something indirectly that we would not be able to do directly. I would hope that you would take that into consideration when you are making this decision with regard to whatever you may feel you have before you. Again, I would emphasize that I would hope that you would come to the conclusion that there is nothing really before you, so you are not involved in this situation at all, and let that Board proceed to make its own determination.

Mr. Chairman, I would like to recognize that I have about three or four of my constituents here from Rochester, NY. They are with the Anthony Jordan Clinic. I was supposed to meet with them, but because of this hearing, I couldn't meet with them. They are over here on the righthand side. We are glad to see you here.

Thank you, Mr. Chairman. Thank you, Ms. Gramm.

Mr. BROOKS. If we are going to introduce constituents, I have some, too. [Laughter.]

I have some Presidential classroom students, two of them from Anahuac, Starla Greer, and Ollie Sandlin, and from Hamshire, David Smith.

Mr. HORTON. We are glad to see you.

[Applause.]

Mr. **Brooks**. They have the best oysters in the world there, big, succulent, East Bay oysters. They will melt in your mouth, won't they? You can eat them any way, raw, broiled, fried, in stew. They are delicious.

Mr. DioGuardi.

Mr. **DioGuardi**. Thank you, Mr. Chairman. You are getting us hungry.

I want to commend the chairman for calling these hearings because I think there is a great need to restore public credibility to the procurement process. Most recently we have seen the President's own Packard Commission reaffirming some of the horror stories that we have thought about in the Pentagon, and we have seen at these hearings in the past the "rush job" mentality that exists in Government agencies. My experience in the private sector tells me that a "rush job" is an excuse for poor planning.

So, many times we force the issue in procurement and get very little for the taxpayer's dollar, or not as much as we should be, because of the process, which is wholly inadequate, from what I can see, from my own experience in the private sector. I think the Packard Commission is going to do us some good.

With that as a backdrop, why is it that the OMB is so interested in injecting itself in this process? Whether you have the authority or not, isn't there a higher authority here, and that is public credibility? Doesn't the public have the right to see a system work so that there can be a procedure to protest situations that are not quite right or don't smell quite right? Why is OMB getting involved?

Dr. **Gramm**. I think the issue is not that we are injecting ourselves where we don't belong. The question is in certain instances we may have the authority to settle disputes between agencies over, for example, Brooks Act jurisdiction, and we are only going to address those narrow issues for which it is our authority and responsibility to do so.

So it is not a matter of injecting ourselves beyond where we ought to be.

Mr. **Bedell**. There is an authority in the Brooks Act itself which provides statutory authority for the Office of Information and Regulatory Affairs to resolve disputes between agencies with regard to certain ADP procurement acquisitions, and it allows the agencies covered by the Brooks Act to submit those disputes to us for resolution. That is what has occurred so far.

So far, we have received three letters asking us to resolve various disputes under the Brooks Act and there are a lot of different issues that come from them. But that is the situation so far. We have received three letters because the statute provides that we will make resolution of certain things.

We have written two in response to those three, the first saying that we hope to make a determination expeditiously here, and another one saying we couldn't make it as fast as we hoped to be able to make it, and we will continue to try to make it as quickly as we can. That is all that has occurred so far.

We haven't sought to inject ourselves in it. Indeed, we are trying to meet what we think our responsibilities are under the act. In fact, if we were simply to ignore the letters that we have received so far, there is even a concern that that would present a legal defect to the proceeding, which then could be carried on through the courts and simply delay matters further.

So there are a lot of issues here, but we have not sought to interject ourselves into bid protest procedures beyond the resolution of this matter.

Mr. **DioGuardi**. So you believe conceptually in the bid protest function. Where your problem is that you feel you have the jurisdiction as opposed to the Board.

Mr. **Bedell**. No. We haven't even made a determination yet with regard to jurisdiction, and certainly we are not contending with the Board for jurisdiction at all. The only thing that is before us right now, again, are three separate letters asking us to resolve a dispute over the coverage, really, of the Brooks Act for these particular contracts. We are not resolving bid protests or anything else in response to those letters.

Mr. **DioGuardi**. Whatever the authority, whatever your interpretation, the practical effect of what you are doing is to hold up the procedure.

Mr. **Bedell**. That is not correct. We have not held up anything at all. Indeed, as I understand it, temporary restraining orders and injunctions have been flying from several different circuits here which have enjoined the General Services Board of Contract Appeals and enjoined several other peoples from proceeding. But we have not enjoined anybody from doing anything so far.

Mr. **DioGuardi**. You make it sound so easy. Why is everything so confused, then?

Mr. **Bedell**. Well, it is a difficult issue, and I'm pleased I was able to make it sound easy. But it is a very difficult issue, with questions, as you heard Mr. Van Cleve say, whether the Government Printing Office is subject to the Brooks Act at all as a result of a 1977 appropriation rider which seemed to give them the authority to procure ADP equipment without regard to the Brooks Act. There is at issue a question of whether this particular contract is really for ADP equipment or whether it is for printing and publishing services, on the other hand, which may not be subject to the Brooks Act.

There are a whole variety of issues that flow from that and there are a whole series of legal questions as to our jurisdiction, the Board's jurisdiction, the effect of these various determinations on jurisdiction and on the legal standing of parties. It is a very complicated issue, and we are trying to restrict ourselves to the very narrow questions presented. Frankly, statements that we are interjecting ourselves into bid protest procedures and things of that nature, are false.

Mr. **Horton**. Will you yield? The problem I have with this is that there is a protest already filed, and it would seem that you ought not to get yourself involved. I hope you won't get involved. One of the bases on which you would not get involved is that there has been a protest filed.

It would seem to me that you do "muddy up the water" when you do get involved on a jurisdictional question, assuming there is a jurisdictional question. I don't think there is. But assuming that there is, it would seem to me that you ought not to be involved when there has already been a protest filed. I think the statutes we have passed make it very clear you don't have a role in a protest.

When you interdict yourself, for whatever purpose, after there is a protest filed, then you are creating a situation in which you get involved in the protest procedure, which is contrary to what the law says. I would hope that the courts would so determine that way, assuming that they will look at it, but I would hope that you would make the decision independently so that we won't have this type of thing again. Otherwise, every time that there is a protest, someone will come in with a jurisdictional question and you are going to be right in the middle of it.

And I will tell you, you will spend all your time handling bid protests and you will be right in the middle of every one of them. And the quicker you get off dead center right now, the better off you are going to be in the future.

Mr. **Bedell**. As you know, in——

Mr. **Horton**. Excuse me. I just want to add that in every one of these things, when there is a contest it is going to have a jurisdictional question, and you are going to have the same problem before you. So you better get off the train now before it starts going.

Mr. **Brooks**. Mr. DioGuardi.

Mr. **DioGuardi**. I just wanted to end by saying that whatever your concern is, time is of the essence. We are spending money like crazy here in Government. We cannot wait to get these procedures working automatically and well for the public benefit so that we are getting a procurement system that's working efficiently and not getting the waste that I viewed here in my first year in Congress, which is just incredible. Otherwise, I think we are doing the public a big disservice.

If we are going to start arguing about jurisdiction at a time when we are wasting money, at a time when we need every dollar, I think it is ridiculous, and whatever you are doing, I hope it is going to be resolved fast.

Dr. **Gramm**. Congressman, we are working as quickly as possible on it.

Mr. **Brooks**. Before you all leave and before we proceed, I wanted to point out that the subcommittee had requested both the GPO and the Justice Department to appear today to answer questions on their involvement in the matter before us, and I'm disappointed that they both decided to refuse the subcommittee's request to appear today.

The Justice Department refused to testify ostensibly because their appearance "would violate their internal rule," which requires Congress to give them 14 days' notice prior to the hearing. They don't say they are unable to be here, rather simply they have a rule against it.

The GPO has refused to attend also as long as the matter is under litigation. Apparently the Public Printer is a lot more comfortable working with the OMB than cooperating with Congress on this issue.

Now, I suspect that their lack of attendance has a lot more to do with the tough issues that they would face if they were here. The committee has received documents, which I will enclose in today's record, that indicate that the Justice Department and OMB have been in cahoots in developing an attack on the Competition in Contracting Act.

They reveal that the Justice Department has been alerted that OMB's intervention into the bid protest process will have harmful effects on the Board's fair and efficient functioning and will severely undermine the Competition in Contracting Act. Nevertheless, together, your office, the OMB and the Justice Department "at high levels" decided several weeks ago to assert authority over this protest and limit the Board's jurisdiction.

The documents also indicate that the Justice Department has blocked the Board from representation before the Federal courts considering the matter. The Justice Department has told the Board that it would be the sole representative for the GSA and the Board could not present its views through legal counsel.

Initially, the GSA had appeared before the Board in the bid protest arguing that the Board had the jurisdiction over the GPO case. However, when suit was filed against GSA in the Federal court, the Justice Department took over as GSA's lawyer and began arguing the exact opposite position to the Federal court. Not surprisingly, that very day GSA withdrew its appearance before the Board.

Incredibly, the Justice Department has managed, for practical purposes, to place itself as a legal representative on both sides of this case. In the litigation before the Federal court, the Justice Department is representing the GSA as a defendant and making the same arguments and taking the same positions as the GPO, who is a plaintiff in the suit.

The Board, whose authority is being challenged from both sides, is not being allowed to present its case. It is kind of hard to see that this is very fair. The situation raises serious ethical and legal concerns which it is imperative we explore with the GPO and the Justice Department.

The subcommittee will set new hearings at the earliest opportunity, and maybe we can convince these agencies that they should drop by and visit with us.

I want to put in the record at this point GSA's statement endorsing their authority of the Board, and I want to include a memorandum from February 13 for John Bates, assistant U.S. attorney in the district court for the District of Columbia, from the staff counsel, Board of Contract Appeals.

He says it is his understanding following a conversation on the afternoon of February 12 that the Department of Justice has concluded that it will present the following three-part position to the court:

No. 1, they say the district court lacks jurisdiction over the matter. This serves as the basis for the Department motion, to be filed February 14, to transfer the matter to the U.S. Court of Appeals.

No. 2, that Public Law 94-440 constitutes a continuing exemption of GPO from the Brooks Act.

No. 3, it goes on to say that OMB, not the Board, speaks for the executive branch regarding the applicability of the Brooks Act should a dispute arise.

He goes on to add that, "We understand that this position has been 'reviewed at high levels of Justice and OMB' and approved, and it is unlikely that it will be significantly altered. The Department of Justice intends to file this position with the Court on 'behalf of GSA and the Board'."

Now, this indicates very clearly, and I say to my current witnesses, that the Justice Department has taken OMB's activity in this matter, whatever you say it is, and used that as a basis to get an injunction from a Federal court to stop the Board and the GSA from functioning as it should.

Now, you may not have intended that, but I hope that you can resolve it. That has been the result of your taking up this case and cooperating with the Justice Department in what I think is their rather unusual effort to distort the activities of the GSA. The GSA Administrator is appointed by the President. He doesn't belong to me. I don't even know who is on the Board. I don't know how many members are on the Board. I don't even care, as long as they are a fair adjudicatory body that represents the people involved, and all the vendors seem to think that it is a fair arena in which to resolve their difference.

Now, that is the problem you have, and I hope you all will go back and visit with your associates and perhaps work up a decision that will get you out of this morass.

[The information referred to follows:]

Board of Contract Appeals
General Services Administration
Washington DC 20405

February 13, 1986

John Bates, Esquire
Assistant United States Attorney
Room 2820
United States Court House
Third and Constitution Avenue, NW
Washington, DC 20001

Dear Mr. Bates:

As mentioned during our conversation this morning, please find the enclosed memorandum which sets forth more fully the Board's position regarding the pending suit at the district court. Our discussion revealed that you are in agreement as to how the Board wishes the Department of Justice to make clear to the court from the outset that the position you are putting forward is not that of the Board, for whom its prior rulings must speak.

Please feel free to call me should any questions arise or change in the position of the Department of Justice occur. Also, although the Board fully intends to remain neutral during the on-going litigation at the courts, we would appreciate receiving courtesy copies of any filings which occur, merely to keep abreast of what transpires.

Sincerely,

Joseph A. Vergilio

Joseph A. Vergilio
Staff Counsel

Enclosure

Board of Contract Appeals
General Services Administration
Washington DC 20405

February 13, 1986

MEMORANDUM FOR: JOHN BATES, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FROM: JOSEPH A. VERGILIO JAV
STAFF COUNSEL, BOARD OF CONTRACT APPEALS

SUBJECT: GSBCA's refusal to have DOJ represent to a federal court that it represents the Board with the presently proposed position in Electronic Data Systems Federal Corp. v. GSBCA, Civ. Action No. 86-0353 (D.D.C. filed Feb. 7, 1986) regarding Xerox Corp., GSBCA No. 8333-P and Volt Information Sciences, Inc., GSBCA No. 8336-P

It is my understanding, following our conversation on the afternoon of February 12, 1986, that the Department of Justice has concluded that it will present the following three-part position to the court:

> 1. The district court lacks jurisdiction over the matter. This will serve as the basis for the Department of Justice motion, to be filed on Friday, February 14, 1986, to transfer the matter to the United States Court of Appeals for the Federal Circuit.
>
> 2. Pub. L. No. 94-440 constitutes a continuing exemption of GPO from the Brooks Act.
>
> 3. Although the Board, similar to an Article III tribunal, has the inherent jurisdiction to determine its own jurisdiction, the Brooks Act specifically addresses the jurisdictional question and gives OMB the authority to settle disputes arising between GSA and another agency as to the applicability of the Brooks Act. This authority applies whenever a dispute arises and is not abrogated by the filing of a protest. OMB, not the Board, speaks for the executive branch regarding the applicability of the Brooks Act should a dispute arise.

We understand that this position has been "reviewed at high levels of Justice and OMB" and approved, and it is unlikely that it will be significantly altered. The Department of Justice intends to file this position with the court on "behalf of GSA and the Board". For the reasons set forth below, the Board respectfully declines to have this position filed on its behalf and requests that the Department of Justice make this clear to the court, representing instead that the orders and opinions of the Board must speak for themselves.

The Competition in Contracting Act of 1984, 40 U.S.C.A. § 759(h)(6)(B) (West Supp. 1985), establishes the United States Court of Appeals for the Federal Circuit as the forum to review a final decision on the merits of a protest issued by this Board. No such decision has yet been rendered. This statute and the Contracts Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (West Supp. 1985), are in pari materia and should be construed with reference to one another. Neither gives the Department of Justice the authority to represent this Board in any matter in which a final decision has not been rendered. Additionally, the Federal Circuit has construed the language in the Contracts Disputes Act of 1978 to permit its review only of final decisions of agency boards. United States v. W.H. Moseley Co., 730 F.2d 1472, 1475 (Fed. Cir. 1984) ("Furthermore, the provision of the CDA providing for appellate review of board decisions, section 607(g), clearly contemplates an appeal of a final decision by the board regarding the merits of a claim, and not of a preliminary procedural order by a board pursuant to section 605(c)(4). This court's jurisdiction is not to be derived from implication, as the government would have it here.").

As an alternative argument to the motion that the district court dismiss this case for lack of jurisdiction, I would like to bring to your attention a recent decision by Judge Hogan, Ticor Title Insurance Co. v. Federal Trade Commission, Civ. Action No. 85-3089 (D.D.C. Jan. 3, 1986) (WESTLAW DCT database) which appears to indicate that this case should be dismissed because it is not ripe for review.

The final two aspects of the Department of Justice position are clearly contrary to the Board's interpretation of the controverted statutes, as expressed in Xerox Corp., GSBCA No. 8333-P, Volt Information Sciences, Inc., GSBCA No. 8336-P (Feb. 4, 1986). It would be inconsistent for the Department of Justice to present any position on behalf of this Board that is contrary to the positions expressed in this Board's opinions and orders. Given the posture of the case, with the Board a named defendant in a suit challenging results it reached in prior opinions and orders, the Board desires to remain neutral and not to be an active participant in the ongoing litigation before the courts. The Board has expressed its position in its prior rulings, which must speak for themselves. The Department of Justice should make this explicitly clear to the court and should in no way intimate that this Board acquiesces in any contrary position. If the above expressed Department of Justice position were also that of the Board, the Board might be seen to be constrained to dismiss the protests for lack of jurisdiction. Such simply fails to accurately reflect the Board's interpretation of the laws.

The Board requests that the Department of Justice make clear to the courts the Board's position that its orders and opinions speak for themselves and the fact that the Department of Justice is not filing the above-stated position on behalf of the Board. Absent such an explicit statement in a filing before the federal district or circuit court, a possible ethical violation would occur as the Board's true position in the case would be misrepresented. Similarly, canons of ethical conduct require the Department of Justice to bring the above-referenced cases to the attention of the court. See Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir.), cert. denied, 105 S.Ct. 306 (1984). If the Department of Justice will not make known to the courts this Board's position in this matter, I wish to be immediately so informed so that the Board may take appropriate action.

General
Services
Administration
Office of
General
Counsel
Washington, DC 20405

January 24, 1986

Vincent A. LaBella
Administrative Judge
General Services Board of Contract Appeals
Washington, D.C. 20405

Subject: GSBCA No. 8333-P
Protest of XEROX CORPORATION

Dear Judge LaBella:

Attached is the original and one copy of the General Services Administration's Motion to Intervene by Intervening Agency in the above-cited protest. Appearances of the following as counsel for the agency are hereby entered in this protest:

Richard Shackleford
Chief Counsel
Claims and Litigation Division

Anthony L. Washington
Trial Counsel
Claims and Litigation Division

Dinah Stevens
Attorney-Advisor
Information Resources and Utilities Division

George N. Barclay
Attorney-Advisor
Information Resources and Utilities Division

Sincerely,

GEORGE N. BARCLAY
Attorney-Advisor
Information Resources & Utilities Division

Attachment

BEFORE THE
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS
Washington, D.C. 20405

Protest of	)	
XEROX CORPORATION	)	GSBCA No. 8333-P
Solicitation No. RFP No. 600-S	)	

MOTION TO INTERVENE BY INTERVENING AGENCY

The General Services Administration (GSA) hereby moves to intervene as an intervening agency in the above-captioned action. This motion is made pursuant to Rules 5(a)(3)(ii) and 5(b)(4) of the Board's Rules of Practice. GSA received notice of the subject protest on January 17, 1986.

The procurement under protest, conducted by the Government Printing Office (GPO) for the use and benefit of the Department of the Army, is for the acquisition of an automatic publishing and retrieval service and support system, creation of a digital data base, data base accessability and management. This system and these services are general purpose automated data processing (ADP) equipment and ADP services as defined by Federal Information Resources Management Regulation (FIRMR) 201-2.001. Authority for this procurement is delegated under certain conditions. See FIRMR 201-23.104-1 (ADPE); FIRMR 201-23.104-5 (ADP Support Services). GSA does not know whether the GPO performed this procurement under the regulation or without GSA's authority. GSA has no record of an agency procurement request (APR) submission or delegation of procurement authority (DPA) grant.

This motion is filed in order to allow GSA to represent the position of the Administrator of General Services on the scope of his authority under the Brooks Act to the extent that the GPO has a position which is different.

Rule 5(a)(3)(ii) provides that GSA is eligible to intervene in a protest on the question of whether a delegation of procurement authority is required.

WHEREFORE, for good cause shown, GSA requests to intervene as an intervening agency in this protest.

ARTHUR J. REID, JR.
Assistant General Counsel
Claims and Litigation Division

R. COLETTE MCKENNA
Acting Assistant General Counsel
Information Resources & Utilities Division

Richard Shackleford by DS
RICHARD SHACKLEFORD
Chief Counsel
Claims and Litigation Division

[illegible]
DINAH STEVENS
Attorney-Advisor
Information Resources and Utilities Division

Anthony L. Washington by DS
ANTHONY L. WASHINGTON
Trial Counsel
Claims and Litigation Division

GEORGE N. BARCLAY
Attorney-Advisor
Information Resources and Utilities Division

1/29/86
DATE

[illegible]
DATE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene by Intervening Agency was delivered by means reasonably calculated to effect delivery within one day after such motion was filed with the Board to:

Irwin Goldbloom, Esquire
Thomas L. Patten, Esquire
Franklin G. Snyder, Esquire
Linda S. Potter, Esquire
Latham, Watkins & Hills
1333 New Hampshire Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Thomas F. Williamson, Esquire
Marcia G. Madsen, Esquire
D. Brent Israelsen, Esquire
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

James C. Lane, Jr., Esquire
Associate General Counsel
Office of General Counsel
U.S. Government Printing Office
North Capital and H Streets, N.W.
Washington, D.C. 20401

I. Michael Greenberger, Esquire
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Robert S. Gorman, Esquire
U.S. Department of the Army
Office of the Judge Advocate General
Contract Law Division (DAJA-KL)
The Pentagon, Room 2C349
Washington, D.C. 20310-2208

Donald C. Holmes, Esquire
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Richard P. Shlakman, Esquire
James D. Duffy, Esquire
Electronic Data Systems Federal
  Corporation
6430 Rockledge Drive
Bethesda, Maryland 20817

Arthur Lazarus, Jr., Esquire
Paul Schnitzer, Esquire
Carl J. Peckinpaugh, Esquire
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600 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20037

[illegible]
DATE

GEORGE N. BARCLAY
Attorney-Advisor
Information Resources and
Utilities Division

General Services Administration
Office of General Counsel
Washington, DC 20405

January 31, 1986

Vincent A. LaBella
Administrative Judge
General Services Board of Contract Appeals
Washington, D.C. 20405

Subject: GSBCA Nos. 8333-P and 8336-P
Protests of XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC.

Dear Judge LaBella:

Attached is the General Services Administration's Supplemental Memorandum of Points and Authorities in Opposition to Motion to Dismiss for Lack of Jurisdiction in the above-cited protest.

Sincerely,

Dinah Stevens

DINAH STEVENS
Attorney-Advisor
Information Resources & Utilities Division

Attachment

BEFORE THE
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS
Washington, D.C. 20405

Protest of	)	
	)	
XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC.	))	GSBCA No. 8333-P No. 8336-P
	)	
RFP 600-S (Government Printing Office)	)	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

The General Services Administration (GSA) has argued in its previous Memorandum in this protest that the Government Printing Office (GPO) is subject to the authority of the Administrator of General Services under the Brooks Act for procurements which fall under the authority of that Act.

GSA assumed arguendo, in accordance with Judge LaBella's Summary of a Prehearing Conference held on Friday, January 24, 1986 in the above-cited protests, "that the procurement at issue is for ADPE as well as for publishing and printing services." This assumption is not sufficient to determine whether the procurement is for ADPE which would fall under the jurisdiction of the Brooks Act.

Normally, the determination of whether a procurement which includes ADP equipment and services is under the authority of the Brooks Act is made by the contracting agency with the assistance of the technical and contracting people who develop the Request for Proposals (RFP). These agency personnel have an understanding of the requirement, the vendors likely to be proposing and the equipment or services likely to be proposed in response to the RFP which assist in making this determination. It is GSA's understanding from the submission and statements of the GPO and its representatives that this Brooks Act evaluation was not performed because the GPO believed that this was not a procurement subject to the Brooks Act. GSA had no notice that GPO believed it was exempt as an agency from the Brooks Act. Necessarily, GSA/IRMS personnel have no opportunity to challenge a determination that the Brooks Act is inapplicable unless, as happened here, the procurement is challenged. We believe, however, that pursuant to the Administrator's exclusive procurement authority over ADP, GSA may properly investigate and if necessary substitute its own technical expertise on the question whether a particular procurement is for ADPE. In such an instance the acquiring agency's determination deserves no particular deference.

It is more difficult for people not closely involved in a procurement to make this evaluation based on the RFP alone. However, it is the determination of GSA Information Resources Management Service (IRMS) personnel who have reviewed this RFP that this is an ADP procurement which should have been conducted under the provisions of the Brooks Act and its implementing regulations.

GSA/IRMS personnel have reviewed the GPO RFP and proposal conference questions and answers provided by the GPO in their Appendix to Memorandum of Points and Authorities in Support of the United States Government Printing Office's Motion to Dismiss for Lack of Jurisdiction, on an expedited basis. Based on this review, and without reference to any other representation of any party, it is GSA's position that this procurement is for ADP resources in support of a publishing service application and is covered by the Brooks Act and implementing regulations, the Federal Information Resources Management Regulation (FIRMR). The procurement falls within the applicability provision set forth at FIRMR 201-1.103(b)(1). This is a procurement for automatic data processing equipment and services falling under the non-exempted portion of FIRMR 201-1.102-3(a)(5), i.e., ADP equipment or services to be used for routine administrative and business applications, in this case publishing.

The overwhelming use of the system and monies expended under this contract will be for ADP equipment, teleprocessing services, telecommunications, software development, and system maintenance. This contract is for design, development, and implementation of an automated editing system. The RFP unmistakenly required significant amounts of ADP to be installed at Government sites, a very sophisticated distributed data base system to be designed and used in conjunction with a satellite based communications system to tie the equipment together as well as extensive teleprocessing services at the contractor site.

Under the caption Operation and Service at page 61 of the RFP it is provided:

> The service must provide for a totally automated environment for management, publication, and transmission of all technical publications and related management reports for the Army. In order to fully understand the nature of the operation, a step-by step explanation of each operation is hereby provided. These steps are: (1) Input of text and graphics, (2) In-process manual development, (3) Retrieval and modification of finalized documents, (4) Copy output, and (5) Management of publications production. (Printing to be done at contractor's facility(s) is covered as a separate operation.)

GSA/IRMS believes that this overview essentially describes the creation, management, and use of a publication data base and the capability to manipulate this data base. This is clearly an ADP service. See FIRMR 201-2.001 (ADP services, ADP support services). The price schedules at pages 18-19 list the services which will perform these functions, which constitute ADP resources. See, for example, page 59, paragraph 17 of the RFP. Further, at page 92 of the RFP LAN (local area networks) types and configurations are described. It is there stated:

> . . .Common to all LAN's will be the need for communication with other locations and with the central publishing base, access to management systems information and the electronic mail system, and any software required to perform all system functions as described. . . .

This brief recitation demonstrates that this procurement is not a printing contract with incidental ADPE but rather an ADP procurement in support of a printing purpose.

Thus, it is GSA's position, based on a review of the RFP alone that the procurement under protest is a Brooks Act procurement.

GPO suggested, at oral argument, that the Department of Defense FAR Supplement at Section 270.101(c) is intended to exempt a procurement for ADPE which is being used in a printing application. If it is so intended, it is in conflict with FIRMR 201-1.302(c) and 201-1.603.

Since this procurement is for ADP equipment and services it must be done under a delegation of procurement authority. It is our understanding that the price proposed by EDS, the successful contractor, for a five year period was approximately $64,000,000. Thus, it would appear that the contract price is approximately $12,000,000 per year. Under FIRMR 201-23.104-7 this procurement would require a specific delegation of procurement authority. The GPO has not submitted the required agency procurement request for this procurement and thus does not have a delegation of procurement authority.

Arthur J Reid Jr.
RICHARD SHACKLEFORD
Chief Counsel
Claims and Litigation Division

1-31-86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and Utilities Division

1/31/86
DATE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum of Points and Authorities in Opposition to Motion to Dismiss for Lack of Jurisdiction was delivered by means reasonably calculated to effect delivery within one day after such motion was filed with the Board to:

Irwin Goldbloom, Esquire
Thomas L. Patten, Esquire
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1/31/86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and
Utilities Division

Services Administration
General Counsel
Washington, DC 20405

January 31, 1986

Vincent A. LaBella
Administrative Judge
General Services Board of Contract Appeals
Washington, D.C. 20405

Subject: GSBCA Nos. 8333-P and 8336-P
Protests of XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC.

Dear Judge LaBella:

Attached is the General Services Administration's Motion for Leave to Supplement the Record in the above-cited protest.

Sincerely,

Dinah Stevens

DINAH STEVENS
Attorney-Advisor
Information Resources & Utilities Division

Attachment

BEFORE THE
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS
Washington, D.C. 20405

Protest of)
)
XEROX CORPORATION and) GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.) No. 8336-P
RFP 600-S (Government Priniting Office)

MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Pursuant to GSBCA Rule 2(b) and 12(f) intervenor General Services Administration (GSA) moves for leave to supplement the record. As grounds therefore, GSA submits as follows.

On January 30, 1986 the Board held oral argument on the Motion to Dismiss this protest for lack of jurisdiction. At the conclusion of that hearing, the Board directed GSA to submit a supplemental memorandum on the jurisdictional issue by 12 o'clock, January 31, 1986. That memorandum was duly filed within the time prescribed by the Board. On January 31, 1986, at approximately 12:30 P.M. a letter addressed to the Honorable Terence C. Golden, Administrator, General Services Administration was delivered to Mr. Frank J. Carr, Commissioner, Information Resources Management Service. That letter, signed by the respective Chairmen of the House Committee on Government Operations and the Joint Committee on Printing, contains their views on the applicability of the Brooks Act to procurement involving printing and ADP. We believe this document to be highly germane to the resolution of the jurisdictional question.

Based upon the foregoing GSA request the Board to grant this motion and accept the attached letter as a supplement to our previously filed memorandum.

RICHARD SHACKLEFORD
Chief Counsel
Claims and Litigation Division

1/31/86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and Utilities Division

1/31/86
DATE

NINETY-NINTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON GOVERNMENT OPERATIONS
2157 Rayburn House Office Building
Washington, DC 20515

January 30, 1986

The Honorable Terence C. Golden
Administrator
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Administrator:

On behalf of the House Committee on Government Operations and the Joint Committee on Printing, we would like to take this opportunity to bring an important matter to your attention.

Owing to rapidly evolving technology, considerable confusion has arisen concerning the manner in which certain products and services incorporating both printing and automated data processing (ADP) features are procured. One recent instance is the award of a contract issued earlier this month, pursuant to RFP 600-S by the Government Printing Office for the Army Integrated Publishing Service. The lack of certainty in some quarters about the procurement authorities required in such cases prompts us to comment jointly on this matter.

It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. Where such procurements incorporate general ADP features, they also should be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act).

In any procurement for which the purchasing agency is unsure about how to proceed, the agency should seek the guidance of the General Services Administration, the Government Printing Office, the Government Operations Committee and the Joint Committee on Printing.

Sincerely,

Jack Brooks, Chairman
House Committee on Government
Operations

Charles McC. Mathias
Chairman
Joint Committee on Printing

Frank Horton

Frank Horton, Ranking Minority
Member
House Committee on Government
Operations

Frank Annunzio
Vice Chairman
Joint Committee on Printing

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion For Leave to Supplement the Record was delivered by means reasonably calculated to effect delivery within one day after such motion was filed with the Board to:

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1/31/86
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Dinah Stevens
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Services Administration
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January 29, 1986

Vincent A. LaBella
Administrative Judge
General Services Board of Contract Appeals
Washington, D.C. 20405

Subject: GSBCA Nos. 8333-P and 8336-P
Protests of XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC.

Dear Judge LaBella:

Attached is the General Services Administration's Memorandum of Points and Authorities in Opposition to Motion to Dismiss for Lack of Jurisdiction in the above-cited protest.

Sincerely,

Dinah Stevens

DINAH STEVENS
Attorney-Advisor
Information Resources & Utilities Division

Attachment

BEFORE THE
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS
Washington, D.C. 20405

Protest of	)	
	)	
XEROX CORPORATION and	)	GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.	)	No. 8336-P
	)	
RFP 600-S (Government Printing Office)	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

The Government Printing Office (GPO) has moved to dismiss the above-cited protest. For purposes of the initial decision on this motion Judge LaBella has stated that it is to be assumed that ADPE was procured.

The issue therefore in this initial opposition submission is whether GSA has jurisdiction over a GPO procurement of ADPE under the Brooks Act (40 U.S.C. 759).

GPO has argued exemption on the grounds of the language of the Legislative Appropriations Act of 1977 (P.L. 94-440). There is a presumption in appropriations act language that it is effective only as to the fiscal year for which the appropriation is effective. (Attachment 1). There are no words of futurity in the proviso exempting GPO from the effect of the Brooks Act and the exemption has been dropped from the appropriations for following years.

The hearings on the 1978 Legislative Appropriation show that the Public Printer asked that the proviso be reenacted and that the Committee on Appropriations recommended deletion of the Brooks Act exemption. (Attachment 2). It was in fact deleted. On this basis there can be no presumption that the proviso in the 1977 Appropriation for the GPO revolving fund has continuing effect.

The GPO is a Federal agency. The Brooks Act applies to all Federal agencies. Unless the GPO can demonstrate an exemption it must be considered to be covered by the Brooks Act.

The Federal Property and Administrative Services Act, section 602(d), provides that the authority of the Joint Committee on Printing shall not be impaired or affected by the provisions of the Property Act. This exemption from the Property Act, however, was negated for automatic data processing equipment (ADPE) by the passage of the Brooks Act, section 111 of the Property Act in October 1965. Subsection (e) of section 111 specifically states: "The. . .provisions of section 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section." Thus, by its language, the Brooks Act clearly takes precedence over the Joint Committee's authority for any ADPE used for printing purposes. GSA is unable to determine on the basis of information presently available to this agency whether this procurement is for ADPE.

It is within the authority of the Administrator of General Services to determine when an agency's procurement is subject to his authority under the Brooks Act. The procuring agency's determination that a procurement does not require a Brooks Act delegation of procurement authority is not dispositive of the question of the application of the Brooks Act. The GPO's contention that this was not a Brooks Act procurement should not be considered conclusive as to the authority of the Administrator with which the jurisdiction of the GSBCA under CICA is coextensive.

Dinah Stevens
for RICHARD SHACKLEFORD
Chief Counsel
Claims and Litigation Division

1/29/86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and Utilities Division

1/20/86
DATE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Points and Authorities in Opposition to Motion to Dismiss for Lack of Jurisdiction was delivered by means reasonably calculated to effect delivery within one day after such motion was filed with the Board to:

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1/29/86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and
Utilities Division

PRINCIPLES OF
FEDERAL APPROPRIATIONS
LAW

FIRST EDITION

JUNE 1982

UNITED STATES GENERAL ACCOUNTING OFFICE
OFFICE OF GENERAL COUNSEL

(5) General Provisions: When Construed As Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of restrictions on the availability of the appropriations. They come in two forms: (a) "provisos" attached directly to the appropriating language, and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used * * * "), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used * * *"). Such a restriction is no less effective merely because it is contained in an appropriation act. E.g., United States v. Dickerson, 310 U.S. 554 (1940). General provisions may also be phrased in the form of positive authority rather than restrictions on the use of appropriations.

As noted earlier in this Chapter, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, i.e., whether it might have been subject to a point of order, is academic and largely immaterial.

This subsection deals with the question of when general provisions can be construed as permanent legislation.

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision renders it clear that such was the intention of the Congress, but when the word "hereafter" or other words indicating futurity are used or when the provision is of a general character bearing no relation to the object of the appropriation, the provision generally has been construed to be permanent legislation. 7 Comp. Dec. 838 (1901); 5 Comp. Gen. 810 (1926); 10 Comp. Gen. 120 (1930); 24 Comp. Gen. 436 (1944); 32 Comp. Gen. 11 (1952); 36 Comp. Gen. 434 (1956).

It follows that a proviso or general provision that does not contain words of futurity will generally not be construed as permanent. 3 Comp. Gen. 319 (1923); 5 Comp. Gen. 810 (1926); 10 Comp. Gen. 120 (1930); 20 Comp. Gen. 322 (1940); 32 Comp. Gen. 11 (1952); A-18614, May 25, 1927; *Minis* v. *United States*, 40 U.S. (15 Pet) 423 (1841); *United States* v. *Vulte*, 233 U.S. 509, 514 (1914); *NLRB* v. *Thompson Products, Inc.*, 141 F.2d 794, 798 (9th Cir. 1944); *City of Hialeah* v. *United States Housing Authority*, 340 F. Supp. 885 (S.D. Fla. 1971).

As noted, the crucial factor is the language of the particular provision, *i.e.*, whether it contains "words of futurity." The most common "word of futurity" is "hereafter" and provisions using this term will usually be construed as permanent. 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); B-108245, March 19, 1952; B-100983, February 8, 1951; B-76782, June 10, 1948.

However, words of futurity other than "hereafter" have been deemed sufficient. Thus, there is no significant difference in meaning between "hereafter" and "after the date of approval of this Act." 36 Comp. Gen. 434 (1956). In 24 Comp. Gen. 436 (1944), the words "at any time" were viewed as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated funds to carry out the provision in the following year as well, merely referring to the provision rather than repeating it.

The words "or any other act" in a provision restricting the expenditure of appropriations "contained in this or any other act" were held to be sufficient words of futurity in 26 Comp. Dec. 1066 (1920). However, a later decision viewed the effect of the words "or any other act" as inconclusive. B-37032, October 5, 1943. In *Norcross* v. *United States*, 142 Ct. Cl. 763 (1958), a general provision barring the payment of compensation to certain non-citizens which contained the words "this or any other Act" but which was preceded by the words "during the current fiscal year" was held applicable only to the funds of that year. In A-88073, August 19, 1937, a proviso restricting the use of funds provided in "this or any other appropriation" was held not to contain words of futurity and was therefore not permanent legislation. See also 18 Comp. Gen. 37, 38 (1938). More recently, GAO considered a restriction on the use of funds "appropriated in this or any other act" and concluded that the words "or any other act" did not indicate futurity but merely referred to other appropriation acts for the same fiscal year. B-145492, September 21, 1976. Since the cases are not definitive, it appears that the effect of an appropriation act restriction using the words "this or any other act" cannot be determined solely on the language used. The various other factors discussed below would have to be taken into consideration.

Other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent. 10 Comp. Gen. 120 (1930); 32 Comp. Gen. 11 (1952); A-89279, October 26, 1937. However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. 434 (1956). This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision which does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. Cf. 18 Comp. Gen. 37 (1938). Thus, if the provision does not contain words of futurity, repetition or non-repetition lead to the same result--that the provision is not permanent. If the provision does contain words of futurity, non-repetition indicates permanence but repetition, although it suggests non-permanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434 (1956); 24 Comp. Gen. 436 (1944). Failure to include a provision in the Code would appear to be of no significance.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. See B-108245, March 19, 1952; B-57539, May 3, 1946; NLRB v. Thompson Products, Inc., supra. In B-192973, October 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. The closer the relationship, the less likely it is that the provision will be viewed as permanent. See 26 Comp. Gen. 354, 357 (1946); 32 Comp. Gen. 11 (1952); B-37032, October 5, 1943; A-88073, August 19, 1937.

Finally, the phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 24 Comp. Gen. 436 (1944); 36 Comp. Gen. 434 (1956). A provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only one day, clearly not the legislative intent. An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in Minis v. United States, supra.

In sum, the additional factors mentioned above are all relevant as indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence.

LEGISLATIVE BRANCH APPROPRIATIONS FOR FISCAL YEAR 1978

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 7932

AN ACT MAKING APPROPRIATIONS FOR THE LEGISLATIVE BRANCH FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1978, AND FOR OTHER PURPOSES

Printed for the use of the Committee on Appropriations

ARCHITECT OF THE CAPITOL
BOTANIC GARDEN
CONGRESSIONAL BUDGET OFFICE
COST-ACCOUNTING STANDARDS BOARD
GENERAL ACCOUNTING OFFICE
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JOINT ECONOMIC COMMITTEE
LIBRARY OF CONGRESS
NONDEPARTMENTAL WITNESSES
OFFICE OF TECHNOLOGY ASSESSMENT
OTHER JOINT ITEMS
U.S. SENATE

U.S. GOVERNMENT PRINTING OFFICE
89-447 O WASHINGTON : 1977

GOVERNMENT PRINTING OFFICE

STATEMENT OF THOMAS F. McCORMICK, PUBLIC PRINTER

ACCOMPANIED BY:

- **JOHN J. BOYLE, DEPUTY PUBLIC PRINTER, OPERATIONS**
- **WALTER C. DeVAUGHN, ASSISTANT PUBLIC PRINTER, MANAGEMENT AND ADMINISTRATION**
- **CARL A. LaBARRE, ASSISTANT PUBLIC PRINTER (SUPERINTENDENT OF DOCUMENTS)**
- **BRYAN W. MERCER, COMPTROLLER**
- **W. SCOTT SONNTAG, CHIEF, CONGRESSIONAL INFORMATION SECTION**

BUDGET REQUEST

Senator HUDDLESTON. The next item on the agenda is the budget of the Government Printing Office.

We are pleased to have with us Mr. Thomas F. McCormick, who is the Public Printer.

The 1978 budget request for the Government Printing Office is $169,820,000, an increase of $28,992,600 over the 1977 level. The principal items of increase are $11 million for printing and binding, $2.4 million for the Office of the Superintendent of Documents, $15.5 million for site acquisition and design costs.

Please proceed, Mr. McCormick.

Mr. McCORMICK. Yes, sir.

PREPARED STATEMENTS

Senator HUDDLESTON. You have statements, I understand, for the record.

Mr. McCORMICK. I would like to submit one of my own and one on behalf of the Superintendent of Documents.

[The statements follow:]

New cataloging tools and techniques were implemented in 1976 which earned us commendations from the Library community and should save some libraries an aggregate of $6 million annually.

The By-Law Distribution Program funded the distribution of over 74 million publications during the fifteen month period ended September 30, 1976.

Improved cost effectiveness has allowed us to absorb the pay increase which was effective October 1, 1976. The Documents appropriation request for Fiscal Year 1978 is $2.4 million over 1977, an increase of 5.1%. Approximately $1.3 million of the increase will be recovered through General Sales Program revenue as will $25.7 million of the $49.6 million total.

Since the prerequisites for requesting appropriated funds for the new GPO facility have not been completed, the request for the $15,500,000 is withdrawn at this time. If you wish, however, I am prepared to discuss it. This action reduces the request for funds from $167,981,570 to $152,461,570.

We again have requested language to remove the Government Printing Office from the requirements of Section 759 of Title 40 of the United States Code. This law was passed to allow the General Services Administration to control the acquisition of automatic data processing equipment within the Federal Government. Recently, however, the General Services Administration has expanded the scope of the law to permit it to control the acquisition of equipment used for printing and, in some cases, printed products. This Office has suffered delays and extra costs as a result of being under this act and we have requested language to remove GPO from the provisions of this law Also, we again have requested language which would remove us from the provisions of Section 638a of Title 31 of the United States Code covering the maintenance, repair, purchase, and lease of motor vehicles. We have always operated on the basis that the entire Legislative Branch was not subject to the provisions of this law and the Appropriations Committee granted us an exemption last year.

I would like to submit, for the record, more detailed supporting data and justification for the appropriation requested for Fiscal Year 1978. That concludes my general statement and I would be happy to answer your questions.

85

LEGISLATIVE BRANCH APPROPRIATIONS FOR 1978

GENERAL SERVICES ADMINISTRATION
LIBRARY
CENTRAL OFFICE

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON LEGISLATIVE BRANCH APPROPRIATIONS

GEORGE E. SHIPLEY, Illinois, *Chairman*

ADAM BENJAMIN, Jr., Indiana
ROBERT N. GIAIMO, Connecticut
JOHN J. McFALL, California
JOHN P. MURTHA, Pennsylvania
BOB TRAXLER, Michigan

WILLIAM L. ARMSTRONG, Colorado
LAWRENCE COUGHLIN, Pennsylvania
ELFORD A. CEDERBERG, Michigan

EARL C. SILSBY and AMERICO S. MICONI, *Staff Assistants*

Printed for the use of the Committee on Appropriations

U.S. GOVERNMENT PRINTING OFFICE
[illegible] O WASHINGTON : 1977

WEDNESDAY, FEBRUARY 23, 1977.

GOVERNMENT PRINTING OFFICE

WITNESSES

THOMAS F. McCORMICK, PUBLIC PRINTER
JOHN J. BOYLE, DEPUTY PUBLIC PRINTER
WALTER C. DeVAUGHN, ASSISTANT PUBLIC PRINTER, MANAGEMENT AND ADMINISTRATION
CARL A. LaBARRE, ASSISTANT PUBLIC PRINTER, SUPERINTENDENT OF DOCUMENTS
BRYAN W. MERCER, COMPTROLLER

Mr. SHIPLEY. The committee will come to order. We have the Government Printing Office with us this morning. Mr. Thomas F. McCormick, the Public Printer, and members of his staff are present to justify the budget for fiscal year 1978.

If you would, Mr. McCormick, please introduce the people that are with you.

Mr. McCORMICK. On my right is Mr. John J. Boyle, Deputy Public Printer; on his right, Mr. Carl LaBarre, Assistant Public Printer in charge of our documents operations, for legal purposes titled the Superintendent of Documents; and on my left is Walter C. DeVaughn, Assistant Public Printer, Management and Administration; and immediately behind me, Bryan W. Mercer, Comptroller.

Mr. SHIPLEY. Thank you. We have a number of new members on the subcommittee. I don't know whether you are familiar with them or not. The gentleman to my left is Mr. Traxler of Michigan, and on the minority side, Mr. Coughlin and Mr. Armstrong have been playing musical chairs. Mr. Armstrong is the ranking minority member now. We are glad to have you with us.

BUDGET REQUEST

We will go ahead and look at your budget. The total budget submitted is $169,820,000, which is an increase of $28,992,600 over 1977 appropriations to date.

REDUCTION IN ORIGINAL REQUEST

Mr. McCormick, I do note in your justification you carry a total of $167,981,000, which shows a reduction of $1,838,430 from the original request.

What is that change?

Mr. McCORMICK. Each year as we prepare for our appropriation hearings, we update our estimates for the year, and we refine them, based on more current information. Our best estimate is now $167,981,000 total.

Mr. SHIPLEY. Of course, that pleases the committee.

1978 we expect to recover our total cost in the general sales program plus about $250,000.

This has been done through cost reduction techniques, raising the prices, and the increased volume. We have separated those publications that the Public Printer does not have control of the pricing into a special sales category. The major ones would be subscriptions to the Congressional Record and the Federal Register, and we can provide a complete list, if necessary.

We are now processing 90 percent of customer orders within 10 workdays, compared with 24 workdays in 1973. We developed a new system to encourage college bookstores to buy more of our publications.

We are further automating our systems such that we will have a full computerized system of processing orders within the next year or year and a half. We have cut our depository library program processing time substantially. Almost all publications are being turned around within 72 hours compared with weeks, 2 years ago. Our pilot program in the distribution of the Code of Federal Regulations in microfiche was successfully completed and we are going to implement the full program, and this will reduce the depository program cost by about $300,000.

NEW CATALOGING TECHNIQUES

Our new cataloging techniques, and tying into the Ohio College Library system, should save the depository library community some $6 million annually.

Cost-cutting techniques allow us to absorb the pay increases which went into effect without a request for supplemental appropriation for 1977. The 1978 documents request is some $2.4 million over 1977. This is 5.1 percent, and of that increase approximately $1.3 million will be recovered through the general sales program.

WITHDRAWAL OF FUNDING REQUEST FOR NEW GPO FACILITY

We have not had a hearing before the House Public Works Committee on the $15.5 million funding for the new GPO facility, therefore, we are withdrawing that request, which reduces our total appropriation request to $152,481,570.

EXEMPTIONS FROM CERTAIN REQUIREMENTS OF LAW

We have included similar language this year, as we did last year, to exempt us from the provision of section 759 of title 40, which relates to the purchase of data-processing equipment as well as section 638a of title 31, which relates to the maintenance, repair and use of motor vehicles. We would be happy to answer any further questions.

Mr. SHIPLEY. Thank you very much, Mr. McCormick.

CRS LISTINGS OF PUBLICATIONS MADE AVAILABLE TO MEMBERS OF CONGRESS

We were talking earlier about those publications and reports that are made available by authorization to Members of the House and Senate, and we asked CRS to put together a factsheet as to those reports and

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 95–450

LEGISLATIVE BRANCH APPROPRIATION BILL, 1978

JUNE 21, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. SHIPLEY, from the Committee on Appropriations,
submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 7932]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the legislative branch for the fiscal year 1978.

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services provided to the general public. The remaining 8 percent relates to services to the executive branch.

The general sales program, for which $26,400,000 is to be appropriated in 1978, makes Government publications available for sale to the public. While this money is ultimately recovered from purchasers of these publications and deposited in the Treasury to the credit of miscellaneous receipts, it nevertheless adds to the amount necessary to be appropriated in the legislative branch appropriation bill.

Government Printing Office Revolving Fund

The request of the Public Printer that the limitation on unvouchered funds be increased from $3,500 to $5,000 has been approved. The Committee recommends the deletion of the exemptions to the provisions of 40 U.S.C. 759 relating to the purchase, lease, and maintenance of automatic data processing equipment, as well as the exemptions to 31 U.S.C. 638a relating to the maintenance, repair, purchase, and lease of motor vehicles. Both exemptions were carried in the 1977 bill.

GENERAL ACCOUNTING OFFICE

Salaries and Expenses

The Committee recommends appropriations totaling $160 million for the General Accounting Office which will permit a continuation of activities at substantially the current level. This allowance is $2,910,500 more than is available for fiscal year 1977 and $8,641,000 less than the amount requested.

The General Accounting Office, as is true of all the related agencies in the bill, provides not only support to the Congress but conducts activities relating to the operation of the Government as a whole. The Comptroller General has estimated that the $168,641,000 General Accounting Office budget request for fiscal year 1978 includes approximately $57 million or 34 percent for work which directly supports the Congress. This includes work mandated by statute and that which is requested by Committees and Members of Congress. The remainder of the work is in the category of self-initiated, as opposed to Congressionally directed work and includes reviews and evaluations to improve the economy, efficiency, and effectiveness of Federal Government operations as well as other accounting and financial improvement responsibilities assigned to the General Accounting Office by general legislation over the years.

SAVINGS FROM GENERAL ACCOUNTING OFFICE ACTIVITIES

The work of the Office does result in savings and collections which are several times the amount of their appropriation. As is shown below collections and savings directly attributable to work by the General Accounting Office totaled over $532 million in 1976.

CHANGES IN EXISTING LAW

Pursuant to clause 3, rule XXI of the House of Representatives, the following statements are submitted describing the effect of provisions in the accompanying bill which directly or indirectly change the application of existing law.

1. On page 4 of the bill there is language allowing the transfer of amounts within the consolidated "Salaries, officers and employees" appropriation upon approval of the Committee on Appropriations of the House.

2. On page 7 of the bill there is language allowing the transfer of amounts within the consolidated "Allowances and expenses" appropriation upon approval of the Committee on Appropriations of the House.

3. On pages 8 and 9 of the bill there is the customary language that makes the provisions of nine House Resolutions, which expire at the end of a Congress, permanent law. This long-time practice eliminates the need to reintroduce resolutions containing provisions of a permanent nature at the beginning of each new Congress.

4. On pages 9 and 10 of the bill there is language authorizing the Joint Committee on Printing to procure temporary or intermittent services of individual consultants or organizations as well as utilize agency personnel, information and facilities on a reimbursable basis for a comprehensive management review and analysis of the Government Printing Office's organization, policies, systems and processes.

5. On page 11 of the bill there is language authorizing advance payments for travel by Capitol Police personnel for training or other purposes, and expenses associated with the relocation of instructor personnel from the Capitol Police Force to and from the Federal Law Enforcement Training Center in Glynco, Georgia.

6. On pages 13 and 14 of the bill there is the customary language adjusting designations, titles and compensation of certain Metropolitan Police Department personnel detailed by the District of Columbia Government to the Capitol Police Force to comport with assigned duties and levels of responsibility.

7. On page 14 of the bill there is language authorizing the Capitol Police Board to detail police from the House Office, Senate Office, and Capitol Buildings for police duty on the Capitol Grounds and on the Library of Congress Grounds.

8. On page 15 of the bill there is language making funds immediately available upon enactment of this Act for reimbursement to the United States Postal Service for "official mail costs". Due to variations in the total volume and cost of outgoing mail from year to year, this language is deemed necessary to insure that funds are available to maintain a current prompt payment status with the Postal Service.

9. On pages 15 and 16 of the bill there is language authorizing the Capitol Guide Board to hire, on an individual basis, employees to fill temporary vacancies for a period of not to exceed ninety days for any one position, notwithstanding the limitation of 28 employees in the bill.

10. On page 16 of the bill there is language amending the regular 1977 Legislative Branch Appropriation Act to provide that $600,000

of the 1977 appropriation to the Office of Technology Assessment shall remain available until expended.

11. The bill includes language on page 18 further increasing the cost limitation by $24,000 for security installations in the "Capitol Buildings Complex" originally authorized in H. Con. Res. 550 and increased in the Second Supplemental Appropriations Act, 1973, the Second Supplemental Appropriations Act, 1975, and the Legislative Branch Appropriation Act, 1977. The increase in cost authorized in the accompanying bill is to accommodate the installation of additional portable security devices throughout the Capitol complex of buildings.

12. The bill provides that specific amounts in several appropriations for the Architect of the Capitol shall remain available until expended. These amounts are for renovations, alterations, and improvements to the buildings under the jurisdiction of the Architect that he anticipates cannot be completed and the money obligated, in full, by the end of the fiscal year, as the work must be performed at such times and in such manner as not to interfere with the occupants of the buildings involved, particularly operations of the Congress.

13. On page 19 of the bill there is language amending the regular 1977 Legislative Branch Appropriation Act to provide that $500,000 of the 1977 appropriation for the Architect of the Capitol, Capitol Buildings, shall remain available until expended. This appropriation relates to the installation of security equipment at the Capitol Power Plant.

14. On pages 19 and 20 of the bill there is language amending chapter V of the Supplemental Appropriations Act, 1973 (Public Law 92-607) by striking the reference to maintaining square 764 in the District of Columbia as a green park area and providing authority to establish a temporary parking facility on the property.

15. One page 21 of the bill there is language amending the regular 1977 Legislative Branch Appropriation Act to provide that $24,000 of the 1977 appropriation for the Architect of the Capitol, Capitol Power Plant, shall remain available until expended. This appropriation relates to modifications to refrigeration equipment.

16. The bill provides language "to remain available until expended" for two Library of Congress appropriations, as follows: "Salaries and expenses," and "Collection and Distribution of Library Materials (special foreign currency program)." The Librarian advises that this authority is required to carry out the orderly acquisition program of the Library.

17. In three instances the language "without regard to section 3709 of the Revised Statutes of the United States, as amended" has been included in the appropriations for the Architect of the Capitol. Section 3709 reads in part "unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except * * * or (4) when the services required to be performed by the contractor in person and are (A) of a technical and professional nature * * *". The instances in the bill relate to the cleaning and repairing works of art, prevention and eradication of insect and other pests, and snow removal.

18. On page 22 of the bill there is language restricting the use of funds appropriated to the Government Printing Office for the printing and binding of the Yearbook of Agriculture which is financed through Department of Agriculture appropriations.

19. On page 22 of the bill there is language relating to congressional printing and binding by the Government Printing Office providing that appropriations recommended shall be available for the payment of obligations incurred under appropriations for similar purposes for preceding fiscal years, primarily due to the unpredictability of the volume of work generated by the Congress.

20. On page 23 of the bill there is language relating to the Botanic Garden providing for the prevention and eradication of insect and other pests and plant diseases by purchase of materials and procurement of personal services by contract without regard to the provisions of any other Act, specifically section 3709 of the Revised Statutes, as amended, which reads in part "unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except * * * or (4) when the services required to be performed by the contractor in person and are (A) of a technical and professional nature * * *".

21. On page 25 of the bill there is authorization that $7,214,000 appropriated to the Library of Congress for "Furniture and furnishings" shall remain available until expended for the purchase of long lead-time items for the initial outfitting of the James Madison Memorial Library Building.

22. On page 26 of the bill, section 202, there is language providing that not to exceed fifteen positions in the Library of Congress may be exempt from the provisions of Appropriations Acts concerning the employment of aliens during the current fiscal year, but the Librarian shall not make any appointment to any such position until he has ascertained that he cannot secure for such appointments a person in any of the categories specified in such provisions who possesses the special qualifications for the particular position and also meets the general requirements for employment in the Library of Congress.

23. On pages 26 and 27 of the bill, section 203, there is language authorizing the Library of Congress to provide benefits, including rental of living quarters in foreign countries and travel benefits, comparable to those provided under specified sections of the Foreign Assistance Act of 1961, as amended. These benefits are not otherwise available to Library of Congress employees.

24. On page 27 of the bill, section 204, there is language authorizing payments in advance for subscriptions or other charges for bibliographical data, publications, materials in any other form, and services whenever the Librarian of Congress determines it to be more prompt, efficient, or economical to do so in the interest of carrying out required Library programs.

25. On page 28 of the bill there is language in section 206 relating to the transportation of employees of the Library of Congress to and from parking facilities, located outside the limits of the Library of Congress grounds without regard to the limitations imposed

by 31 United States Code 638a(c)(2). This section states "Unless otherwise specifically provided, no appropriations available for any department shall be expended— * * *(2) for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes, and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment. * * *".

26. Section 207 on pages 28 through 30 of the bill, authorizes the Disbursing Officer of the Library of Congress to disburse funds appropriated to the Congressional Budget Office, to provide financial support to the Office as may be required and mutually agreed to by the Librarian and the Director of the Congressional Budget Office and authorizes the Library of Congress to compute and disburse the basic pay of all personnel of the Congressional Budget Office, except the Director, pursuant to the provisions of 5 U.S.C. 5504.

27. Section 208 on page 30 of the bill authorizes the Library of Congress to compute and disburse the basic pay of all personnel of the Copyright Royalty Tribunal pursuant to the provisions of 5 U.S.C. 5504. Authorization for the Library to provide administrative support is included in the basic legislation establishing the Tribunal.

28. On page 31 of the bill there is language relating to Library buildings and grounds providing that $100,000 shall remain available until expended. This amount is to provide fire protection improvements which the Architect of the Capitol anticipates cannot be completed during the fiscal year.

29. On page 31 of the bill there is language restricting the use of funds appropriated to the Government Printing Office for the printing and binding of the Yearbook of Agriculture which is financed through the Department of Agriculture.

30. On pages 31 and 32 of the bill there is language relating to printing and binding by the Government Printing Office providing that appropriations recommended shall be available for the payment of obligations incurred under appropriations for similar purposes for preceding fiscal years, primarily due to the unpredictability of the volume of work generated by the Congress.

31. On page 31 of the bill there is language providing that the printing and binding appropriation to the Government Printing Office shall not be available to provide more than 34 copies of the Congressional Record to any Member of the House for distribution. The current allotment is 68 as provided by section 906 of title 44 of the United States Code.

32. On pages 33 and 34 of the bill there is language relating to the General Accounting Office authorizing the direct procurement of expert and consultant services under 5 U.S.C. 3109, but at rates for individuals not to exceed the per diem rate equivalent to the rate for grade GS-18. 5 U.S.C. 3109 authorizes the procurement of expert and consultant services when authorized by an appropriation or other statute, and permits compensation therefor at rates exceeding the daily equivalent of the highest rate payable under 5 U.S.C. 5332 only when specifically authorized by the appropriation or other statute authorizing such services. The language provides the specific authority required by 5 U.S.C. 3109.

33. On page 34 of the bill there is language relating to the General Accounting Office authorizing the hire of one passenger motor vehicle. 31 U.S.C. 638a(a) prohibits the use of appropriations to purchase or hire passenger motor vehicles, with certain exceptions not applicable to the General Accounting Office, unless specifically authorized by an appropriation or other law. The language provides the specific authority required by 31 U.S.C. 638a(a).

34. On page 34 of the bill there is language authorizing the General Accounting Office to make "advance payments in foreign countries notwithstanding section 3648, Revised Statutes, as amended (31 U.S.C. 529)." That section provides that no advance of public moneys shall be made in any case unless authorized by the appropriation concerned or other law. The language provides this authorization.

35. On page 34 of the bill the General Accounting Office is authorized to provide benefits, including rental of living quarters in foreign countries and travel benefits, comparable to those provided under specified sections of the Foreign Assistance Act of 1961, as amended. These benefits are not otherwise available to General Accounting Office employees.

36. On pages 34 and 35 of the bill there is language making the appropriation for the General Accounting Office, and appropriations for administrative expenses of any other member department or agency, available to finance an appropriate share of the costs of the Joint Financial Management Improvement Program (JFMIP) and the National Intergovernmental Audit Forum or a Regional Intergovernmental Audit Forum. The language constitutes the congressional approval required by the following provision contained each year in the Treasury, Postal Service, and General Government Appropriation Act; *see e.g.*, Public Law 94–363, section 608 (90 Stat. 979):

"No part of any appropriation contained in this or any other Act, shall be available to finance interdepartmental boards, commissions, councils, committees, or similar groups under section 214 of the Independent Offices Appropriations Act, 1946 (31 U.S.C. 691) which do not have prior and specific congressional approval of such method of financial support."

The language of the bill further provides that payments to either the Forum or the JFMIP may be credited as reimbursements to any appropriation from which costs involved are initially financed. Absent this language, such payments would be for deposit to the Treasury as miscellaneous receipts under 31 U.S.C. 484.

37. On page 36 of the bill there is language prohibiting the use of funds in the Act for the maintenance or care of private vehicles except for emergency assistance and cleaning as may be provided under regulations relating to parking facilities for the House issued by the Committee on House Administration.

38. On page 36 of the bill there is language that notwithstanding any other provisions of law, none of the funds in the Act shall be used to pay pages of the House in excess of the gross annual maximum rate of compensation in effect on June 30, 1975.

LIMITATIONS AND LEGISLATIVE PROVISIONS

The following limitations and legislative provisions not heretofore carried in connection with any appropriation bill are recommended:

Mr. **Horton**. Mr. Chairman, just so, there is no misunderstanding, I would like the message to go that I agree with what the chairman has said 100 percent.

Mr. **Brooks**. Thank you very much for coming down.

Our next witnesses will appear as a panel. They are attorneys representing the firms who brought charges before the GSA Board of Contract Appeals on this procurement.

Irwin Goldbloom, who is a partner in the law firm of Latham, Watkins & Hills and counsel for Xerox, presents the protester's remarks; accompanied by Arthur Lazarus, Jr., a senior litigator in the law firm of Fried, Frank, Harris, Shriver & Jacobson and counsel for AT&T; and Thomas F. Williamson, a partner with Morgan, Lewis & Bockius, counsel for Volt Industries.

Gentlemen, I appreciate your being here today, and your statements will be made part of the record.

We will recognize, I think, Mr. Goldbloom, who is going to be the spokesman.

STATEMENT OF IRWIN GOLDBLOOM, REPRESENTING XEROX CORP.; ARTHUR LAZARUS, JR., REPRESENTING AT&T TECHNOLOGIES, INC.; AND THOMAS F. WILLIAMSON, REPRESENTING VOLT INFORMATION SCIENCES, INC.

Mr. **Goldbloom**. Thank you, Mr. Chairman and members of the subcommittee.

It is a privilege to appear here before the subcommittee on behalf of the protesters.

On January 16, 1986, Xerox filed a timely protest of a contract that had been awarded by the GPO to EDS. We believe that this contract calls for a major procurement of automatic data processing resources. Volt Information Services and AT&T Technologies similarly filed protests before the GSA Board of Contract Appeals.

These protests raise serious and important challenges to the procurement, alleging violations of a number of laws and regulations.

Despite the protesters' efforts to have their claims heard in an expedited manner, the GPO and the Army have taken a series of actions designed to prevent the Board from a prompt resolution of this controversy on the merits.

Initially, the GPO together with EDS, the party to whom the contract was awarded, challenged the Board's jurisdiction, asserting a number of legal arguments which contended—among other things—that the GPO was not subject to the Brooks Act and that, in any event, the OMB had some supervening authority concerning ADP procurement which ousted the Board of any jurisdiction to resolve the dispute.

The Board, after full briefing and argument by all the parties concerned—including GPO, EDS, and the protesters—rejected these contentions and set the case down on an expedited schedule of discovery leading toward a trial date which should have commenced tomorrow, March 6, 1986. Final decision by the Board, if the case had been on schedule, would have taken place on or about March 24. And so, just 3 weeks hence, we would have had this entire protest resolved by the Board. Thus far, we have been stymied.

After losing the jurisdictional argument before the Board, the GPO and the Army, together with EDS, then commenced a collateral attack upon the Board's jurisdiction by filing an action in the U.S. District Court for the District of Columbia, raising all of the same contentions and claiming irreparable injury.

It was at this point that the Department of Justice entered into the proceedings and took positions which were inconsistent with the jurisdiction of the Board of Contract Appeals. And in two respects, the Justice Department took positions which we find unexplainable.

In the first instance, the Board of Contract Appeals had, as of that time, in an opinion found that it had jurisdiction over the protest controversies. The Department of Justice failed to support the determination, made in a regular, orderly proceeding, by a Contract Board of Appeals which had been established by the Congress.

And secondly, the Department of Justice failed to support the time-honored principle of the exhaustion of administrative remedies—something that the Department of Justice regularly supports—in which the parties would be required to pursue their administrative remedies to a conclusion, subject to judicial review by the court. Again, the Department failed to support that concept and urged that the Board did not have jurisdiction.

Now coming before the court, the parties made claims of irreparable injury based upon a so-called parade of horrors about what would happen if they could not continue this contract. But at the same time, at the suspension hearing before the Board of Contract Appeals, these same parties refused to make any showing concerning the urgent and compelling need for the services that were called for under the contract.

They took their arguments to the Federal District Court, and made certain arguments of that character, even though the judge at the Board of Contract Appeals had invited them specifically to come back and make whatever showings of urgent and compelling needs they needed to make.

Now the case has been transferred to the Court of Appeals for the Federal Circuit.

In our view, the actions by the GPO, the Army, and the Department of Justice have been designed to undermine the jurisdiction of the GSBCA and to frustrate the efforts of the protesters to have their contentions considered on the merits.

That is all that we are interested in, having our contentions heard by the Board on their merits.

This has required the protesters to engage in a costly series of collateral legal proceedings, all of which have deterred us from our central purpose; namely, to have our protests heard in a timely fashion.

Moreover, the arguments that the GPO and the Army have raised are without merit and they have been rejected by the Board of Contract Appeals. That should have been the end of it, at least until final judicial review.

Furthermore, the actions by the GPO and the Army have been designed to frustrate the will of Congress by preventing a prompt resolution of the protests. The legislative history of the Competition in Contracting Act discloses congressional concern under prior protest procedures, that, because of delays involved in proceedings, successful protesters often found themselves unable to obtain the appropriate relief.

In this case, we would have reached the resolution of this dispute in about 3 weeks. As of this date, it is unclear when a final resolution will take place.

We want only the opportunity, under fair proceedings, to have our contentions ruled upon. Thus, the conduct of the Government agencies involved has frustrated that purpose and undermined the statutory procedures carefully crafted by the Congress.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Goldbloom follows:]

Statement Submitted on Behalf of

XEROX CORPORATION
AT&T TECHNOLOGIES, INC.
VOLT INFORMATION SCIENCES, INC.

by

IRWIN GOLDBLOOM
and WILLIAM FLYNN
Representing Xerox Corporation,

ARTHUR LAZARUS, Jr.
Representing AT&T Technologies, Inc.,

and

THOMAS F. WILLIAMSON
Representing Volt Information Sciences, Inc.

Before the

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

March 5, 1986

Xerox Corporation ("Xerox"), AT&T Technologies, Inc. ("AT&T"), and Volt Information Sciences, Inc. ("Volt"), are pleased to submit jointly this statement, in connection with the Subcommittee's investigation of the compliance by Federal agencies with the Brooks Act, Pub. L. No. 89-306, and the Competition in Contracting Act of 1984, Pub. L. No. 98-369.

A. Introduction

Xerox, AT&T, and Volt are all protesting parties in the case of Xerox Corp., GSBCA Nos. 8333-P and 8336-P, a bid protest dispute currently pending before the General Services Board of Contract Appeals ("GSBCA"). This protest is a challenge brought by private parties against the Government Printing Office ("GPO"), and the Department of the Army ("the Army"), asserting violations of a number of laws and regulations. Among the challenged actions are: (1) unlawful award of the contract to Electronic Data Systems Federal Corporation ("EDS") after a protest had already been filed; (2) violation of applicable regulations by GPO in permitting EDS's reduction in price following its best and final offer; (3) EDS's hiring of one of the Army evaluators who was involved in developing the program and was responsible for reviewing the competing proposals; (4) the failure by GPO and the Army to test the complete EDS system; and (5) serious flaws in the testing and evaluation process.

These allegations involve contested questions of fact, the proper forum for which is the GSBCA. The parties were in the middle of discovery on these issues when EDS, joined by GPO, brought an action in the United States District Court for the District of Columbia to enjoin further proceedings and permit the contract to proceed. The Department of Justice supported the request for a restraining order and agreed with GPO. The District Court entered a temporary restraining order on February 19, 1986. Electronic Data Systems Federal Corp. v. GSA, 45 Fed. Contracts Report 332 (Feb. 19, 1986). This order halted the proceedings only two weeks before trial (which had been scheduled to begin tomorrow, March 6, 1986) and has allowed GPO, EDS, and the Army to continue to perform this contract pending a resolution of the dispute on the merits. The proceeding before the District Court was subsequently transferred to the United States Court of Appeals for the Federal Circuit. Under the time limits imposed by section 2713 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369 ("CICA"), the GSBCA's final decision would have been rendered no later than March 24, 1986.

GPO has also petitioned the Office of Management and Budget ("OMB") to invoke its authority under 40 U.S.C.

§ 759(g) to review "proposed determinations" of the General Services Administration ("GSA") relating to the selection of requirements or the use of ADP resources by an agency. GPO seeks to have OMB declare that GPO is not subject to the Brooks Act, and that this procurement is not an automatic data processing procurement within the meaning of the Brooks Act.

The protesters in the case have consistently taken the position that the GSBCA is the appropriate forum for resolution of this dispute. The GSBCA has the primary responsibility for determining the coverage of the Brooks Act, and the GSBCA's interpretation is subject to review by the United States Court of Appeals for the Federal Circuit. The protesters have opposed the assertions of GPO, the Army, and the Justice Department, that OMB is the appropriate forum to rule on the applicability of the Brooks Act to a particular protest.

Although they are pleased to be invited take part in this oversight hearing, the protesters wish to emphasize that they are not seeking any decision by this Subcommittee as to the merits of their protests or the legal arguments which are pending before the GSBCA and the Federal Circuit.

B. OMB is Not a Proper Forum for Resolution of These Protests

Under 40 U.S.C. § 759(g), OMB may review "proposed determinations" of GSA which relate to the requirements for or use of automatic data processing ("ADP") equipment by agencies. When there is a lack of "mutual agreement between the Administrator [of GSA] and the agency or user," OMB can review and decide the "proposed determination."

Whatever the scope of OMB's review authority, it is clear that it does not apply in cases where the dispute is between private parties and the procuring agency. Congress specifically designated the GSBCA as an appropriate forum for resolving protest disputes regarding ADP procurements. The GSBCA, on request of an interested party, must "review any decision by a contracting officer alleged to violate a statute or regulation." 40 U.S.C. § 759(h)(1). This is an action brought by disappointed offerors against an agency, and therefore § 759(g) is irrelevant.

Although OMB previously has issued interpretations of the Brooks Act, the GSBCA has held that it is not bound by OMB interpretations. SDA Federal Systems, Inc., GSBCA No. 8180-P, 85-3 BCA ¶ 18,493 at 92,868 (OMB has no "appellate role whatsoever vis a vis this Board in the litigation of protests . . . . We answer to the Federal Circuit in protests just as we do in cases under the Contract Disputes Act of 1978 . . . ."). The GSBCA reaffirmed this position in the instant case. Xerox Corp., GSBCA Nos. 8333-P & 8336-P, 45 Fed. Contracts Report 254, 257 (Feb. 4, 1986). Review of GSBCA decisions is vested in the Federal Circuit under 40 U.S.C. § 759(h)(6)(A), and it is the role of the Federal Circuit, not OMB, to determine whether the GSBCA has misinterpreted the Brooks Act in a protest proceeding. See also 45 Fed. Contracts Report 306, 307 (Feb. 24, 1986) (statement of OMB attorney that OMB's interpretation of Brooks Act is not binding on courts).

C. GPO is Subject to the Brooks Act.

Before the GSBCA, and in its letter to OMB, GPO asserted that it is exempted by law from the Brooks Act. This assertion raises a pure question of law, which certainly will be reviewed by the United States Court of Appeals for the Federal Circuit. The issue involves the construction of CICA, the Brooks Act, the Legislative Appropriations Act of 1977, Pub. L. No. 94-440, and portions of title 44 of the United States Code. It is a question that is properly before the GSBCA, and which, if appealed, ultimately will be settled by the appropriate federal court.

In any event, the assertion by GPO and the Justice Department that GPO is not subject to the Brooks Act is incorrect. It has explicitly been repudiated by the Joint Committee on Printing, which supervises GPO. In a letter to GSA, the Chairmen and Vice Chairman of the Joint Committee on Printing and the Chairman and ranking minority member of the House Committee on Government Operations stated:

> It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. Where such procurements incorporate general ADP features, they should also be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act).

Letter to Hon. Terence C. Golden, Administrator of GSA, from Hon. Jack Brooks, Hon. Frank Horton, Hon. Charles McC. Mathias, and Hon. Frank Annunzio, January 30, 1986 (emphasis added). This letter represents the Joint Committee on Printing's construction of the printing laws which it administers as the governing body of GPO.

All of the relevant statutes also support this interpretation. GPO is a "Federal agency" and hence is subject to the Brooks Act. 40 U.S.C. §§ 759(a), 472(b). The Comptroller General specifically has held that GPO is not exempt from the Brooks Act, and that "[t]he fact that [GSA's] authority . . . might cover items which would otherwise be classified as 'printing, binding, or blankbook work' is of no consequence." 48 Comp. Gen. 462, 463 (1969).

GPO's claim to an express exemption is based solely upon a proviso contained in the Legislative Branch

Appropriation Act, 1977, Pub. L. No. 94-440, 90 Stat. 1459, which contained the following provision:

> The Government Printing Office is hereby authorized to *make such expenditures, within the limits of funds available* . . . and to make such contracts and commitments without regard to fiscal year limitations . . . *as may be necessary in carrying out the programs and purposes set forth in the budget for the current fiscal year* for the "Government Printing Office revolving fund"; . . . *Provided further*, That funds available to the Government Printing Office may be expended to purchase, lease, maintain and otherwise acquire automatic data processing equipment without regard to the provisions of 40 U.S.C. 759 . . . .

90 Stat. at 1460 (emphasis added). GPO's argument depends upon its assertion that this provision in an annual appropriations act permanently exempted GPO from the Brooks Act.

There is no legal basis for GPO's position. The proviso on its face is limited to the 1977 fiscal year, since it is appended as a clause to a provision which specifically authorizes expenditures and contracts "set forth in the budget for the current fiscal year." 90 Stat. at 1460. (Presumably, this Committee was surprised to learn that the Brooks Act had been amended in the 1977 Legislative Appropriations Act to *permanently* exempt GPO.)

Moreover, the proviso contains no words of futurity, such as "hereafter" or "after the date of this act," and it is well-settled that provisions in annual appropriations acts are not presumed to have effect beyond the fiscal year involved unless they specifically contain words of futurity. See United States v. Vulte, 233 U.S. 509, 514 (1914); NLRB v. Thompson Products, Inc., 141 F. 2d 794, 798 (9th Cir. 1944); 36 Comp. Gen. 434 (1956); Comp. Gen. No. B-208705 (Sept. 14, 1982). See also TVA v. Hill, 437 U.S. 153, 190 (1978) (the "doctrine disfavoring repeals by implication" applies "with even greater force when the claimed repeal rests solely on an Appropriations Act"). The lack of appropriate language in this proviso is emphasized by the fact that in the same appropriation Congress used such words where it meant to effect a permanent change. See, e.g., 90 Stat. at 1359 ("Hereafter, notwithstanding any other provisions of law," copies of Statutes at Large will be delivered only to Congressmen who ask for them).

Nor can GPO point to anything in the legislative history of this provision which indicates any intent of Congress that it be permanent. In fact, all of the subsequent actions of Congress and GPO make it clear that there was no such intent. The Public Printer himself acknowledged that GPO's exemption was limited to the 1977 fiscal year. The next year, he went before Congress again, seeking to renew GPO's exemption. Although he testified before both Senate and House committees, and was questioned extensively, he never suggested that he believed that the

1977 proviso had permanent effect. See Legislative Branch Appropriations for Fiscal Year 1978: Hearings Before a Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess. 435 (1977) (hereinafter "1978 House Hearings"); Legislative Branch Appropriations, Fiscal Year 1978: Hearings Before the Senate Committee on Appropriations, Part II, 95th Cong., 1st Sess. 417 (1977). Nor did a single Senator or Representative. In fact, Mr. Shipley, Chairman of the House subcommittee, in response to the Public Printer's request that the exemption be made "permanent law," specifically noted at the hearings that the expressed intent of Congress was to include the GPO under the coverage of the Brooks Act. 1978 House Hearings at 496-97. The Public Printer was unsuccessful in convincing him or his committee, since Mr. Shipley's subcommittee subsequently recommended deletion of the exemption from the 1978 Legislative Appropriations Act, which was done. See H.R. Rep. No. 450, 95th Cong., 1st Sess. 36 (1977). It has never been reenacted.

GPO has been well aware that it is subject to the Brooks Act. In 1969, the Comptroller General specifically held that GPO was subject to the Brooks Act. See 48 Comp. Gen. 462, 463 (1969). The Public Printer knew that his agency did not have an exemption when he sought, without success, to have Congress renew GPO's exemption in the 1978

Legislative Appropriations Act. And the Joint Committee on Printing, as noted above, has recognized that the law applies.

Moreover, the Federal Procurement Regulations, which were in effect when the RFP in this case was issued, specifically provided:

> The acquisition of Joint Committee on Printing (JCP) controlled equipment in FSC Group 70 dedicated to printing processes and utilizing computer technology, including electronic printing systems, integrated printing systems, and photo-composition equipment, continues to be subject to the provisions of title 44, U.S. Code and the JCP Government Printing and Binding Regulations as well as to this regulation.

FPR § 1-4.1102-1 n.2 (emphasis added). GPO can advance no plausible case for its claim to be excused from the requirements of the law.

D. This is a Procurement of ADP Resources

GPO has also alleged before the GSBCA and OMB that this procurement is not a procurement of ADP resources. This issue entails significant factual questions, since the issue of what is being procured is clearly one of fact. It cannot be decided in the abstract. The protestors have consistently argued that the GSBCA, with its modern discovery tools and its trial-type procedures, is the appropriate forum for resolving these issues.

The fact that this contract contains a printing component is irrelevant. As noted above, the Joint

Committee on Printing, the Comptroller General, and the GSBCA have all agreed that where GPO acquires printing and ADP resources, it is subject to the Brooks Act.

The GSA, in its pleadings before the GSBCA, argued that this procurement contained a large ADP component. The offerors who took part in this procurement are such well-established ADP firms as AT&T, Volt, Xerox, and Electronic Data Systems Federal Corporation, each of which is subcontracting the actual printing of the manuals. GPO and the Army apparently have recognized all along that the terms of the RFP were such that they could be met only by an ADP firm. See Program 600-S Preproposal Conference: Questions and Answers at 21-22.

The bulk of the RFP calls for creation of up to 200 local area networks, each with data and graphics processing capacity, and the creation of a master data base of all Army manuals. The RFP includes such traditional ADP equipment as "word processors," "textual scanners," "graphic editorial devices," "sophisticated terminals," "microcomputers or terminals," "electronic files," an "automated distribution and mailing system, a "central electronic library," an "electronic mailbox," and "a device that can translate digital data from a variety of other devices and allow the manipulation of that data as though it was created on the contractor's proposed system." RFP at

56-60. Most of the equipment which will be used on the system will be installed directly at Army sites and will come directly from GSA Federal Supply Schedules for ADPE (Group 70).

The ADP is also clearly severable from the actual printing, as GPO and the Army have admitted. See Program 600-S Preproposal Conference: Questions and Answers at 21-22 ("Q. Could not the commercial printing and binding needs of a contract be handled under a separate contract? . . . A. Part 1 - Yes, it could.").

GPO's attempt to characterize this vast data processing network and data base management system as a simple "printing" contract is merely a tactic to avoid compliance with the Brooks Act.

E. Conclusion

The protestors believe that the attempt by GPO and the Department of Justice to inject OMB into the middle of an ongoing bid protest proceeding is unwise, inappropriate, and contrary to the procedures for resolving protests set forth in the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984). The actions of GPO and the Department of Justice have resulted in delaying the final resolution of these issues.

The protesters again wish to emphasize that the questions addressed in this statement are properly resolved by the GSBCA under the statutory procedures set forth in CICA for resolving these protests. The protestors believe that the statutory procedure set forth in CICA is the appropriate procedure for resolving these bid protest disputes.

Mr. **Brooks**. Well, I said at the outset that we are indeed honored, here at the subcommittee, to have such distinguished legal support for our concern about the procurement proceedings at GPO. With your background at the Justice Department, as counsel here in Washington for major concerns, we are delighted to have your support.

It does seem that the allegation that you make on page 2 regarding a violation of regulations by the GPO, which permitted EDS' reduction in price following its best and final offer is kind of a key factor. Some people would call that collusion. Other people would say it is just a little technical error, or was a mathematical error.

But it was $24 million. That is a pretty good little bite. And there are not many secretaries that authorize $24 million up or down. Not many.

And I think that your position is very well stated and appropriate. And all you are interested in is a fair shot in the appropriate Board, where you feel you can get a decent hearing. And I think it is an excellent statement and you laid out all the problems beautifully.

If you did not make so much money, we would like to have you working for us. [Laughter.]

Do you believe that OMB's conclusions regarding the Brooks Act are binding on the Board?

Mr. **Lazarus**. The answer to that is no, Chairman Brooks. They have two separate functions and the Board is the decisionmaking body, as designated by Congress, on protests.

Mr. **Brooks**. Thank you, Mr. Lazarus.

In your view, what is GPO's basis for asserting that it is not covered by the Brooks Act?

Mr. **Williamson**. Mr. Chairman, it seems to be relying on two things, No. 1, that 1977 appropriations provision which we think clearly is temporary legislation. I imagine this committee would be astounded to find that in 1977 there was permanent legislation exempting the GPO from the Brooks Act.

The second point that they seem to be relying on is that this is not a procurement of ADP equipment. Now that is utter nonsense. It is a factual question, however, which we need the Board to resolve. OMB is not equipped to resolve that. We have to have evidence entered, witnesses questioned, and so forth. OMB is not doing that.

Mr. **Brooks**. Due process.

Mr. **Williamson**. Yes, sir. Absolutely. And that is what my client, for one, expected when he went to the Board. He did not expect to get pulled through a series of court battles and have this drag out like it has. I do not think anybody expected that.

Mr. **Brooks**. Does the GPO rely on anything besides the 1977 Appropriations Act in asserting that it is not covered by the Brooks Act?

Mr. **Williamson**. They seem to now be making the argument also that these are services, not just printing services but services as such. And making the argument that ADP services are not covered by the Brooks Act.

The Board has already decided, in two instances, that services are covered. One of those cases is on appeal to the Federal circuit.

We also feel, very clearly, that the Brooks Act contemplated expressly the growth of the ADP industry and deliberately left open the definition of what it covered for this sort of contingency that we see now.

Mr. **Brooks**. It changed as the industry grew and as the parameters expanded.

Mr. **Williamson**. Absolutely, and I am not sure there was—when the Brooks Act was passed—such a thing as ADP services. There clearly are now and they have been construed by the Board, as I say, in two instances to be covered by the Brooks Act.

That seems to be their third argument.

Mr. **Brooks**. Thank you very much, Mr. Williamson.

What position has GSA taken on GPO's assertion? What is the GSA position on the Board, as you see it?

Mr. **Goldbloom**. Mr. Chairman, initially during the Board proceedings, before they were suspended, the GSA took the position that the GPO was subject to the Brooks Act and, having examined the RFP in this particular instance, made a determination and so advised the Board that, in its view, this was ADP procurement subject to the Brooks Act

Mr. **Brooks**. Thank you.

Mr. Horton.

Mr. **Horton**. Mr. Chairman, I want to agree with what you said and I want to commend the gentlemen for their testimony and for the written testimony that has been presented.

It is unusual for us to have attorneys for three clients of the stature of these clients involved in a bid protest testifying before us together on something like this. But I do think—as I said earlier—I do think that there is a fundamental problem that we have here. The thrust of this whole hearing should be that this process, which we have set up to try to expeditiously resolve bid protests, is not permitted to be fouled up by something like what is going on here now.

And you gentlemen happen to be caught—as attorneys and your clients—happen to be caught in the middle of something that is unfortunate, it seems to me. But maybe we can clarify this and make it so that in the future—and perhaps even in this one—that we can proceed expeditiously and not have the delays that we have had before. This is my 24th year in Congress and I was on the Procurement Commission. And I spent almost 3 years going through the various things that we did with the Procurement Commission.

And one of the problems that we have had over the years is to have expeditious bid protests so we can move along and not have things held up so that the contracts can be performed and the airplane is built and sitting on the tarmac and then they say well, it is too bad. It is too late now, but we have the airplane or we got the machine or whatever it happens to be. And then it is too late. It costs too much to back away from these contracts.

And that has been a very serious problem in the procurement process. And I think that if this type of thing continues we are going to have the same problem here.

Let me ask you this, do you think that the Board, the General Services Board of Contract Appeals, has the expertise needed to resolve contract disputes of the type involved here?

Mr. **Goldbloom**. Absolutely, Mr. Horton. They have exhibited it in the past and they were well on their way to resolving that in this instance, when the proceedings were suspended.

Mr. **Lazarus**. I think that is perfectly illustrated by the testimony Mr. Biddle gave earlier today, that the Board has the expertise and it is actually doing a first-class job that the vendors appreciate.

Mr. **Williamson**. Let me also agree with that, Mr. Horton. We brought the first protest ever brought before that Board and we have brought several since. And we have won some and we have lost some. But we have always been very pleased with the way the Board has handled the thing. We have been able to get due process and get the facts out on the table—which we were never able to do at the GAO, for instance, prior to this.

It has been a very satisfying experience to have it.

Mr. **Horton**. That is great testimony.

Are you impressed that the Board is capable of rendering a prompt decision and providing due process to all interested parties?

Mr. **Williamson**. They have never missed a deadline yet.

Mr. **Lazarus**. The 45-working-day time schedule that Congress has established really keeps the parties toeing the mark. You do not have any such deadlines, either at the GAO or at the district court. This is a very expeditious procedure.

As we see it, it was one that Congress set up which gives the parties a full opportunity to have their grievances heard and determined on the facts, and yet, at the same time, does not unduly delay the procurement process.

Mr. **Williamson**. One of the sad things about this case is but for what GPO and the Justice Department have done to this point, we would have this thing resolved in about 2½ weeks.

We probably will not even be to the merits, at this rate, by then. In fact, I am sure we will not.

Mr. **Horton**. What is the proper role of OMB in ADP procurement? Does the filing of a protest alter this role?

Mr. **Williamson**. I don't see where the OMB has any role at all in protests. The provision of the Brooks Act that they are relying on or are supposedly preparing an answer in response to, to us, clearly is a provision that envisions OMB being a mediator in procurement planning. When an agency, for example, goes to OMB and asks for a DPA or wants to get this kind of equipment or that kind of equipment, if GSA and the agency can't agree, then OMB, I think, plays a role there to mediate.

But once a protest has been filed, that's a protest between private parties and the procuring agency, and OMB has no role. It's not geared up to do that sort of thing, and it's just astounding to me that they've taken so long to provide an answer to the question they've been given. It seems to me, they should have written back the next day and said, "We've got no role in this thing. It's a protest."

Mr. **Horton**. That's perfectly logical to me. I would agree with you 100 percent.

Yes?

Mr. **Lazarus**. One of the interesting aspects of this case is that now the Department of Justice has enforced uniformity on the Government, so that the GSA has had to withdraw from the case, there isn't even a dispute among agencies. There is nothing for OMB to decide.

Mr. **Goldbloom**. If I may add, Mr. Chairman, the role of the OMB seems very clearly specified in the statute to be an arbiter of disputes over requirements and use of ADP equipment. The controversy that has been engendered in this dispute are essentially legal questions, legal issues concerning whether or not this 1977 Appropriations Act provision is permanent law or whether the GPO is subject to the Brooks Act, and those are legal questions, legal questions that usually tribunals decide. And I don't know of any special expertise that the Congress recognized in OMB in the Brooks Act to decide these legal issues

Mr. **Horton**. It would seem to me that there's no peg on which they can hang their hat in this instance. I would agree with you that the Brooks Act is very clear. And for them to use that Brooks Act definition to put them into the middle of a bid protest, it seems to me, is completely outside the jurisdiction of that law and certainly they are not included in the bid protest procedure in the Competition in Contracting Act.

I have a few other questions, but I will submit those in writing and ask that you give your answers in writing, so we can have them on the record.

Again, thank you for your testimony and the well-prepared statement that you've presented to the committee. Thank you.

Mr. **Brooks**. Mr. DioGuardi.

Mr. **DioGuardi**. I, too, want to thank you for your testimony. I think it was clear, and I have no specific questions, except that I join with the chairman in feeling comfortable with your presence here and your expertise.

Perhaps you or one of your partners might consider a sabbatical so we in Government can have the best kind of thinking in making our case.

Thank you.

Mr. **Brooks**. Thank you. I cannot recall when we have had more careful and accurate analysis of the basic problems upon which the hearing was founded, done so well, with such gracious expertise, and your clients ought to be very proud of you.

Thank you very much for being here.

And I will say that the OMB has got a real problem here, and I noticed that in the sworn testimony of Frank McDonough, Deputy Administrator for Information Resources from the GSA, had an interesting statement when asked this question by the GAO: "Is there a concern that as a result of withdrawing as intervenor that GSA's position in this matter will not be adequately represented before the Board? Is that or is that not a concern? And explain."

Answer: "Not to me. The real concern that I have, the audience that is important to GSA's interest in this matter is OMB, not the Board."

And I hope that they will look that over and revise that attitude when they draw up their decision.

We appreciate the testimony of all the witnesses, and I want to thank them for being here. And without objection, the record will remain open for the inclusion of additional statements, documents, and other evidence relevant to the subject matter of these hearings.

This concludes today's hearings on the efforts to circumvent the Competition Act, and the hearing is adjourned, subject to the call of the Chair.

[Whereupon, at 12 noon, the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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APPENDIX 1.—LETTER FROM MORTON H. MEYERSON, PRESIDENT, ELECTRONIC DATA SYSTEMS CORP., TO CHAIRMAN JACK BROOKS, APRIL 5, 1984

EDS

Electronic Data Systems Corporation
Office of Government Affairs
229 Pennsylvania Avenue S.E.
Washington, D.C. 20003
(202) 543-5000

RECEIVED
APR 6 1984
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

April 5, 1984

The Honorable Jack Brooks
Chairman
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the Electronic Data Systems Corporation (EDS), I would like to take this opportunity to commend you for the introduction of H.R. 5184, the Competition in Contracting Act of 1984. EDS has long championed competitive bidding of ADP acquisitions as a means of obtaining the highest quality products and services at the lowest possible overall cost.

In this regard, we believe the level of full and open competition in government procurement should be raised, and that there is a great need to establish understandable yet enforceable rules and procedures relative to what constitutes competition.

We believe further that some mechanism must exist that (1) allows aggrieved parties the opportunity to air legitimate protests and (2) creates incentives for the procuring entity to engage in practices that foster full and open competition to the maximum extent practicable.

For these reasons, we support the objectives of H.R. 5184. Additionally, and in the spirit of cooperation, we submit for your consideration a list of provisions contained in the legislation which in our view require further refinement.

I appreciate this opportunity to discuss this most important matter with you. Should you have any questions regarding the attached, or if EDS can be of any assistance, please do not hesitate to call on me.

Sincerely,

Mort Meyerson

Morton H. Meyerson
President

MM:kl

Recommendations

In studying H.R. 5184, EDS identified two aspects that could lead to serious difficulties for companies that have been awarded contracts through fair and open competition.

1. Delay of Contract Performance. Under current provisions of H.R. 5184, dissatisfied bidders could file protests involving automated data processing contracts with both the General Accounting Office and the General Services Administration, and contract performance would be delayed in most instances as long as bid protests were pending. While this would provide for thorough review of protests before contract implementation, it could also result in lengthy delays in contract performance and duplication of effort by GSA and GAO. If legitimate contracts can be held up indefinitely, winning contractors that have acted in good faith will be heavily penalized, and the ability of government agencies to benefit from state-of-the-art systems will be jeopardized.

   We recommend an alternative which incorporates many of the features of the existing proposal in a two-step protest process with reasonable deadlines for the completion of protest review. Under this procedure, all protests involving ADP procurement would be filed initially with GSA, which would be given 15 days to disallow frivolous protests and forward remaining protests to GAO for final action. GAO would be required to act on the remaining protests within 60 days.

2. Exclusion of Current Contractors. The proposed legislation would allow current contractors to be excluded from competition in order to establish or maintain alternative sources of supply. Specific guidelines are necessary to prevent the arbitrary use of this provision to exclude contractors that are performing well in order to provide assistance to less qualified firms. For example, promotion of alternative sources might be allowed when necessary to maintain national security.

Appendix 2.—RFP No. 600-S Chronology

RFP No. 600-S
Chronology

December 4,1984	GPO on behalf of Army issues RFP.
April 1, 1985	Proposals submitted.
November 12-16, 1985	Xerox Benchmark.
December 2-6, 1985	AT&T Benchmark.
December 16, 1985	BAFO's submitted.
January 2, 1986	Xerox revises BAFO from $67.9 million to $66.9 million. EDS revised BAFO from $89.0 million to $64.2 million.
January 9, 1986	Xerox notified of award to EDS (by letter.)
January 9, 1986	AT&T protests to GAO. . GPO/Army raised technical score of EDS to combined EDS/TPC score. . EDS allowed to reduce its offer after BAFO's. . Army evaluator on proposals hired briefly by EDS.
January 16, 1986	Xerox protests to Board. . GPO receives compensation for coordinating procurement for Army. . No DPA under Brooks Act (B/M) was for ADPE). . No B/M for combined EDS/TPC system. . EDS technical score raised to combined EDS/TPC score. . EDS substantially reduces its offer after BAFO's. . EDS system not responsive.
January 21, 1986	Volt protests to Board. . No DPA. . B/M criteria different then required by RFP (no B/M done on one mandatory) . No B/M of combined EDS/TPC system. . 2 offerors lowered price after BAFO's. . EDS hires Army employee who worked on proposal. . B/M tests changed (serial-parallel). . GAO lines/inch requirements withdrawn (req. by B/M package, dated 9/18/85). . (Note: EDS could not pass it?)

January 21, 1986 cont'd.	. GAO protest. . Xerox told at 3:30 p.m. January 9, 1986, that award not yet made. . AT&T filed protest at 3:30 p.m. January 9, 1986, to GAO. . EDS announced award to EDS on January 10, 1986, by Public Printer ($64,215,136.24) (award made after GAO protest).
January 21, 1986	. Volt protests to Board. . No DPA. . B/M criteria different than stated in RFP, no B/M for one mandatory. . No B/M for combined EDS/TPC system. . Two offerors revised prices after BAFO's (EDS and Xerox). . No test of mandatory 600 and lines/inch at B/M (EDS could not meet it). . EDS technical score raised as a result of EDS/TPC combined offer.
January 24, 1986	Pre-hearing Conference by Board
January 27, 1986	Motion to dismiss for lack of jurisdiction by Board. . GPO exempted from Brooks Act by P.L. 94-440. . GPO exempt because it is printing contract (GPO-JCP determination). (JCP) supervised procurement). . Board not allowed under CICA to hear from non-Brooks Act procurements. . Protests are untimely.
January 29, 1986	Oposition by Volt to motion to dismiss for lack of jurisdiction. . GPO is Federal agency subject to Brooks Act. . 600-S - ADP procurement. . Board has jurisdiction over Brooks Act procurements.
January 29, 1986	Opposition of AT&T to motion to dismiss.
January 29, 1986	Supplemental points by EDS (intervenor) on motion to dismiss.
January 30, 1986	Hearing by Board.

January 31, 1986	Supplemental Points by GSA.
January 31, 1986	EDS comments on hearing (January 30).
January 31, 1986	GPO comments on heearing (January 30).
January 31, 1986	Xerox supplemented memo on opposition to motion to dismiss.
January 31, 1986	Volt supplemented memo on opposition to motion to dismiss.
February 3, 1986	GPO asks OMB to decide applicability of Brooks Act to 600-S.
February 4, 1986	GPO - motion for leave to supplement record.
February 4, 1986	Opinion by Board (Judge Labelle). . GPO is subject to Brooks Act.
February 6, 1986	Opinion by Board (Judge Labelle) . Temporary suspension of Contract pending resolution on merits.
February 11, 1986	Joint motion by GPO/Army to strike Army as "co-counsel" and allow Army to be intervenor.
February 13, 1986	Board granted Army's motion.
February 14, 1986	GSA gives notice of withdrawal from protest - Board accepts.

APPENDIX 3.—JOINT LETTERS FROM CHAIRMAN BROOKS AND RANKING MINORITY MEMBER FRANK HORTON, COMMITTEE ON GOVERNMENT OPERATIONS, AND CHAIRMAN CHARLES McC. MATHIAS AND VICE CHAIRMAN FRANK ANNUNZIO, JOINT COMMITTEE ON PRINTING, TO PUBLIC PRINTER RALPH E. KENNICKELL, JR., AND TO GSA ADMINISTRATOR TERENCE C. GOLDEN, JANUARY 30, 1986

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NINETY-NINTH CONGRESS
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House of Representatives
COMMITTEE ON GOVERNMENT OPERATIONS
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MAJORITY—225-5051
MINORITY—225-5074

January 30, 1986

The Honorable Terence C. Golden
Administrator
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Administrator:

On behalf of the House Committee on Government Operations and the Joint Committee on Printing, we would like to take this opportunity to bring an important matter to your attention.

Owing to rapidly evolving technology, considerable confusion has arisen concerning the manner in which certain products and services incorporating both printing and automated data processing (ADP) features are procured. One recent instance is the award of a contract issued earlier this month, pursuant to RFP 600-S by the Government Printing Office for the Army Integrated Publishing Service. The lack of certainty in some quarters about the procurement authorities required in such cases prompts us to comment jointly on this matter.

It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. Where such procurements incorporate general ADP features, they also should be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act).

In any procurement for which the purchasing agency is unsure about how to proceed, the agency should seek the guidance of the General Services Administration, the Government Printing Office, the Government Operations Committee and the Joint Committee on Printing.

Sincerely,

Jack Brooks

Jack Brooks, Chairman
House Committee on Government
Operations

Frank Horton

Frank Horton, Ranking Minority
Member
House Committee on Government
Operations

Ch McC Mathias

Charles McC. Mathias
Chairman
Joint Committee on Printing

Frank Annunzio

Frank Annunzio
Vice Chairman
Joint Committee on Printing

[illegible]

NINETY-NINTH CONGRESS
Congress of the United States
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MAJORITY—225-5051
MINORITY—225-5074

January 30, 1986

The Honorable Ralph E. Kennickell
Public Printer
Government Printing Office
North Capital and H Streets, N.W.
Washington, D.C. 20401

Dear Mr. Kennickell:

On behalf of the House Committee on Government Operations and the Joint Committee on Printing, we would like to take this opportunity to bring an important matter to your attention.

Owing to rapidly evolving technology, considerable confusion has arisen concerning the manner in which certain products and services incorporating both printing and automated data processing (ADP) features are procured. One recent instance is the award of a contract issued earlier this month, pursuant to RFP 600-S by the Government Printing Office for the Army Integrated Publishing Service. The lack of certainty in some quarters about the procurement authorities required in such cases prompts us to comment jointly on this matter.

It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. Where such procurements incorporate general ADP features, they also should be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act).

In any procurement for which the purchasing agency is unsure about how to proceed, the agency should seek the guidance of the General Services Administration, the Government Printing Office, the Government Operations Committee and the Joint Committee on Printing.

Sincerely,

Jack Brooks, Chairman
House Committee on Government
Operations

Frank Horton

Frank Horton, Ranking Minority
Member
House Committee on Government
Operations

Charles McC. Mathias
Chairman
Joint Committee on Printing

Frank Annunzio
Vice Chairman
Joint Committee on Printing

APPENDIX 4.—LETTER FROM PUBLIC PRINTER RALPH E. KENNICKELL, JR., U.S. GOVERNMENT PRINTING OFFICE, TO CHAIRMAN BROOKS AND RANKING MINORITY MEMBER HORTON, FEBRUARY 3, 1986

1861 · 125th ANNIVERSARY · 1986

United States Government Printing Office
Washington, D.C. 20401

OFFICE OF THE PUBLIC PRINTER

February 3, 1986

RECEIVED
FEB 4 1986
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Honorable Jack Brooks
Chairman, Committee on Government Operations
U.S. House of Representatives
Washington, DC 20515

Honorable Frank Horton
Ranking Minority Member
Committee on Government Operations
U.S. House of Representatives
Washington, DC 20515

Dear Messrs. Brooks and Horton:

As you are aware, the Government Printing Office recently awarded a major contract to provide for the Department of the Army's needs for massive quantities of printed technical and training manuals. This contract, Program 600-S, resulted from months of cooperative work between the Directorate of Army Publications and GPO's Printing Procurement Department, and is the largest contract of its kind ever awarded by the Government. Program 600-S balances the Army's requirements for this much-needed service with the Government's policy to use private sector contractors to the maximum extent possible to provide goods and services at the most competitive price.

Because of the significance of this contract to GPO's continued ability to fulfill the printing requirements of the Federal Government, especially in light of the modern printing technology which is expected to be utilized in its performance, I sought to ensure that the most efficient and cost-effective procurement procedures be used in this, and future, procurements. Accordingly, approximately two months ago I asked our Inspector General to conduct a review of the procedures utilized and to provide me with a report of her findings, including any recommendations she may have with respect to possible improvements.

Following the award of the 600-S contract to the lowest bidder, the unsuccessful offerors filed protests, challenging GPO's procurement. A protest was filed initially at the General Accounting Office, and then, improperly we believe, at the General Services Administration Board of Contract Appeals (GSBCA).

I have just been informed that your committee has decided to initiate its own investigation into the merits of the allegations of the protesters. I have therefore instructed the GPO Inspector General to accelerate her review and to cooperate fully with your committee's investigation. Our General Counsel and his staff will, of course, continue to prepare for and represent GPO's interests in the resolution of the bid protests.

I wish to stress that I have every confidence in the ability of GPO's Printing Procurement Department to develop a contract of this unprecedented scope, to execute its award in accordance with all applicable laws and regulations, and to provide for its administration with the best interests of the Government and taxpayer in mind. The professional integrity of GPO's Printing Procurement operations, in my opinion, has been unfairly called into question as a result of the bid protests filed by the unsuccessful offerors. I am confident that, upon completion of your committee's investigation, the facts pertaining to these issues will demonstrate that my continued confidence in GPO's Printing Procurement operations is well-founded.

Sincerely,

RALPH E. KENNICKELL, JR.
Public Printer

cc: Honorable Charles McC. Mathias
Chairman, Joint Committee on Printing

APPENDIX 5.—LETTER FROM PUBLIC PRINTER RALPH E. KENNICKELL, JR., TO OMB DIRECTOR JAMES C. MILLER III, FEBRUARY 3, 1986

1861 · 125th ANNIVERSARY · 1986

United States Government Printing Office
Washington, D.C. 20401

OFFICE OF THE PUBLIC PRINTER

February 3, 1986

The Honorable James C. Miller, III
Director, Office of Management & Budget
Old Executive Office Building
Washington, D.C. 20503

Dear Mr. Miller:

This letter is written to request that you exercise your inter-agency dispute resolution authority under 40 U.S.C. § 759(g) and determine that Government Printing Office ("GPO") procurements of printing pursuant to 44 U.S.C. §§ 501 and 502 are not subject to the authority of the General Services Administration ("GSA") under the Brooks Act, P.L. 89-306.

This dispute between GPO and GSA as to the proper scope of each agency's respective authority has recently developed in the context of a major contract we recently awarded (the "600-S Program or Contract"). On January 9, 1986, GPO awarded a contract for integrated publishing services to provide Department of the Army with technical and training manuals. The contract was awarded to Electronic Data Systems Federal Corporation ("EDS") which submitted the lowest offer on the 600-S Program and its proposal received the highest technical score. Over the 5-year life of the program, the value of the contract is estimated to exceed $300 million.

This procurement was conducted from the outset as a procurement of printing pursuant to the Public Printer's exclusive authority over public printing. The procurement is solely for printing. No automatic data processing equipment ("ADPE") is being purchased or leased, although all the offerors proposed to use computer-assisted elements in providing the requested printing. The Government Printing Office has never had any doubt that this procurement is within its exclusive authority over public printing and not subject to the GSA's authority over ADPE procurements. Certainly no provision of GSA's Federal Information Resources Management Regulation provides any support for the proposition that a procurement of printing services is subject to the GSA's procurement authority over automatic data processing equipment under the Brooks Act. Nor has GSA ever indicated to us that they would deem this procurement of printing to be subject to the Brooks Act.

Furthermore, during the lengthy course of the procurement none of the competitors ever questioned the validity of GPO's determination to conduct the 600-S procurement as a printing procurement pursuant to GPO's exclusive authority over public printing. Nonetheless, following the award, two unsuccessful offerors, Xerox Corporation and Volt Information Sciences, Inc., filed protests on January 16 and 21, 1986, respectively, before the General Services Administration Board of Contract Appeals ("GSBCA"), GSBCA Nos. 8333-P and 8336-P. The asserted jurisdictional basis for filing the protests before the GSBCA is the contention of the protestors that the 600-S Program is a procurement of automatic data processing equipment subject to the GSA's government-wide procurement authority under the Brooks Act and that therefore the GSBCA has jurisdiction under § 2713 of the Competition in Contracting Act of 1984, 40 U.S.C. § 759(h).

On January 27, 1986, GPO filed a motion with the GSBCA to dismiss for lack of jurisdiction. That motion and its supporting memorandum are enclosed. GPO's memorandum and the Request for Proposals submitted as an appendix thereto (a copy of which is also enclosed), show that this is a printing procurement and that neither GSA nor the GSBCA has jurisdiction over the challenged procurement. GPO's memorandum also points out that the Office of Management and Budget is the statutorily designated arbiter of inter-agency disputes under the Brooks Act. GSA filed a memorandum in opposition of GPO's motion, and a copy of that memorandum is enclosed.

On January 30, 1986, the GSBCA heard oral argument on GPO's motion to dismiss.[1] The Board indicated that it would issue an opinion deciding the jurisdictional question no later than Wednesday morning, February 5, 1986, and that it would hold a hearing at 2:00 p.m. that day (assuming that it denies GPO's motion) on whether to suspend the contract. GPO thus faces the imminent possibility that this significant printing and publishing contract of great importance to the Army will be ordered terminated by a Board that has no lawful jurisdiction over GPO on this procurement. Should the contract be suspended, the Government would lose approximately $49,000 per day in foregone savings as compared with the current methods of publishing Army technical manuals.[2]

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[1] GPO filed a supplemental post-hearing brief, a copy of which is also enclosed.

[2] I previously made this estimate in connection with my finding under 31 U.S.C.A. § 3553(d)(2) that, notwithstanding a GAO protest filed by a third unsuccessful offeror, AT&T Technologies, Inc., continued performance of this contract would be in the best interests of the United States. A copy of this determination is enclosed. (GAO dismissed AT&T's protest, noting that AT&T could resubmit a timely protest should the GSBCA dismiss the proceedings before it.)

Because of the urgency and importance of this matter, we urge you to give this request expedited consideration. Should you require any further information for your record, we stand ready to respond to your requests.

Sincerely,

RALPH E. KENNICKELL, JR.
Public Printer

cc: The Honorable Terence C. Golden,
Administrator, General Services
Administration
(Without Enclosures)

The Honorable Charles McC. Mathias, Jr.
Chairman, Joint Committee on Printing
(Without Enclosures)

APPENDIX 6.—LETTER FROM IRWIN GOLDBLOOM, COUNSEL FOR XEROX CORP., ARTHUR LAZARUS, JR., COUNSEL FOR AT&T TECHNOLOGIES, INC., AND THOMAS F. WILLIAMSON, COUNSEL FOR VOLT INFORMATION SCIENCES, INC., TO OMB DIRECTOR JAMES C. MILLER III, FEBRUARY 24, 1986

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February 24, 1986

BY MESSENGER

The Honorable James C. Miller, III
Director, Office of Management & Budget
Old Executive Office Building
Washington, D. C. 20503

Re: Letter from Ralph E. Kennickell, Jr., Public Printer of the United States, Dated February 3, 1986.

Dear Mr. Miller:

On behalf of Xerox Corporation, AT&T Technologies, Inc., and Volt Information Sciences, Inc., we wish to address the matters raised by the Government Printing Office ("GPO") in the above-referenced letter. Xerox, AT&T, and Volt are all protesting parties in the case of Xerox Corp., GSBCA Nos. 8333-P and 8336-P, the "dispute" currently pending before the General Services Board of Contract Appeals ("GSBCA") to which GPO refers in its letter. This bid protest is not a dispute between agencies; it is a challenge brought by private parties against GPO and the Army, asserting violations of a number of laws and regulations. Among the challenged actions are: (1) unlawful award of the contract to Electronic Data Systems Federal Corporation ("EDS") after a protest had already been filed; (2) violation of applicable regulations by GPO in permitting EDS's massive reduction in price following its best and final offer; (3) EDS's hiring of one of the Army evaluators who was involved in developing the program and was responsible for reviewing the competing proposals; (4)

the failure by GPO and the Army to test the entire EDS system; and (5) serious flaws in the testing and evaluation process.

GPO asks OMB to invoke its authority under 40 U.S.C. § 759(g) to review and decide "proposed determinations" of GSA relating to the selection of requirements or the use of ADP resources by an agency, and to declare that this procurement is not subject to the Brooks Act. Whatever the scope of OMB's authority, it should not be exercised in this case.

The legal and factual arguments advanced by GPO are incorrect. We have enclosed with this letter copies of the briefs filed by the parties in the District Court, which set forth the relevant law in detail. We present below a summary of the key portions of the argument.

A. GPO is Subject to the Brooks Act.

In its letter, GPO asserts that it is exempted by law from the Brooks Act. We respectfully submit that this assertion raises a pure question of law, which certainly will be reviewed by the United States Court of Appeals for the Federal Circuit. The issue involves the construction of CICA, the Brooks Act, the Legislative Appropriations Act of 1977, and portions of title 44 of the United States Code. It is most properly one for the appropriate federal court to resolve.

In any event, we submit that GPO's construction is incorrect. It has explicitly been repudiated by the Joint Committee on Printing, which supervises GPO. In a letter to GSA referring to this procurement, the chairmen and ranking minority members of both the Joint Committee on Printing and the House Committee on Government Operations stated:

> It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections

> 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. *Where such procurements incorporate general ADP features, they should also be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act)*.

Letter to Hon. Terence C. Golden, Administrator of GSA, from Hon. Charles McC. Mathias, Hon. Frank Annunzio, Hon. Jack Brooks, and Hon. Frank Horton, January 30, 1986 (emphasis added). This letter, which is appended as an exhibit to the briefs of both AT&T and Xerox, represents the Joint Committee on Printing's construction of the printing laws which it administers as the governing body of GPO.

All of the relevant statutes support this interpretation. GPO is a "Federal agency" and hence is subject to the Brooks Act. 40 U.S.C. §§ 759(a), 472(b). The Comptroller General specifically has held that GPO is not exempt from the Brooks Act, and that "[t]he fact that [GSA's] authority . . . might cover items which would otherwise be classified as 'printing, binding, or blankbook work' is of no consequence." 48 Comp. Gen. 462, 463 (1969).

GPO's claim to an exemption is based solely upon a proviso contained in the Legislative Branch Appropriation Act, 1977, Pub. L. No. 94-440, 90 Stat. 1459, which contained the following provision:

> The Government Printing Office is hereby authorized to *make such expenditures, within the limits of funds available* . . . and to make such *contracts and commitments* without regard to fiscal year limitations . . . *as may be necessary in carrying out the programs and purposes set forth in the budget for the current fiscal year* for the "Government Printing Office revolving fund": . . . *Provided further*, That funds available to the Government Printing Office may be expended to purchase, lease, maintain and otherwise acquire automatic data processing equipment without regard to the provisions of 40 U.S.C. 759 . . . .

90 Stat. at 1460 (emphasis added). GPO's argument depends upon its assertion that this provision in an annual appropriations act permanently exempted GPO from the Brooks Act.

There is no legal basis for GPO's position. The proviso on its face is limited to the 1977 fiscal year, since it is appended as a clause to a provision which specifically authorizes expenditures and contracts "set forth in the budget for the current fiscal year." 90 Stat. at 1460.

Moreover, the proviso contains no words of futurity, such as "hereafter" or "after the date of this act," and it is well-settled that provisions in annual appropriations acts are not presumed to have effect beyond the fiscal year involved unless they specifically contain words of futurity. *See United States v. Vulte*, 233 U.S. 509, 514 (1914); *NLRB v. Thompson Products, Inc.*, 141 F. 2d 794, 798 (9th Cir. 1944); 36 Comp. Gen. 434 (1956); Comp. Gen. No. B-208705 (Sept. 14, 1982). *See also TVA v. Hill*, 437 U.S. 153, 190 (1978) (the "doctrine disfavoring repeals by implication" applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). The lack of appropriate language in this proviso is emphasized by the fact that in the same appropriation Congress used such words where it meant to effect a permanent change. *See*, *e.g.*, 90 Stat. at 1359 ("Hereafter, notwithstanding any other provisions of law," copies of Statutes at Large will be delivered only to Congressmen who ask for them).

Nor can GPO point to anything in the legislative history of this provision which indicates any intent of Congress that it be permanent. In fact, all of the subsequent actions of Congress and GPO make it clear that there was no such intent. The Public Printer has acknowledged that GPO's exemption was limited to the 1977 fiscal year. The next year, he went before Congress again, seeking to renew GPO's exemption. Although he testified before both Senate and House committees, and was questioned extensively, he never suggested that he believed that the 1977 proviso had permanent effect. *See Legislative Branch Appropriations for Fiscal Year 1978: Hearings Before a*

Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess. 435 (1977) (hereinafter "1978 House Hearings"); *Legislative Branch Appropriations, Fiscal Year 1978; Hearings Before the Senate Committee on Appropriations, Part II*, 95th Cong., 1st Sess. 417 (1977). Nor did a single Senator or Representative. In fact, Mr. Shipley, Chairman of the House subcommittee, in response to the Public Printer's request that the exemption be made "permanent law," specifically noted at the hearings that the expressed intent of Congress was to include the GPO under the coverage of the Brooks Act. 1978 House Hearings at 496-97. The Public Printer was unsuccessful in convincing him, since Mr. Shipley's subcommittee subsequently recommended deletion of the exemption from the 1978 Legislative Appropriations Act, which was done. *See* H.R. Rep. No. 450, 95th Cong., 1st Sess. 36 (1977). It has never been reenacted.

GPO's assertion that it had no notice of the fact that the Brooks Act applies to it is irrelevant. It is also hardly credible. The Comptroller General in 1969 specifically held that GPO was subject to the Brooks Act. *See* 48 Comp. Gen. 462, 463 (1969). The Public Printer without success, asked Congress to renew GPO's exemption in the 1978 Legislative Appropriations Act. And the Joint Committee on Printing, as noted above, has recognized that the law applies.

Moreover, the Federal Procurement Regulations, which were in effect when the RFP in this case was issued, specifically provided:

> The acquisition of Joint Committee on Printing (JCP) controlled equipment in FSC Group 70 dedicated to printing processes and utilizing computer technology, including electronic printing systems, integrated printing systems, and photo-composition equipment, continues to be subject to the provisions of title 44, U.S. Code and the JCP Government Printing and Binding Regulations *as well as to this regulation*.

FPR § 1-4.1102-1 n.2 (emphasis added). GPO can advance no plausible case for its claim to be excused from the requirements of the law.

B. This is a Procurement of ADP Resources

GPO's request also raises the issue of whether this is a procurement of ADP resources. It therefore raises significant factual questions. The issue of what is being procured is clearly one of fact. It cannot be decided in the abstract. It does not appear that OMB has the adjudicative procedures necessary to take evidence and weigh facts, and cannot develop an adequate factual record with respect to whether this is an ADP procurement.

In any event, there is no basis for this argument. As the Joint Committee on Printing, the Comptroller General and the GSBCA have all agreed, where services acquired by GPO contain ADP resources, they are subject to the Brooks Act.

Moreover, this RFP clearly is one which is predominantly for ADP resources. The offerors are such well-established ADP firms as AT&T, Volt, Xerox, and Electronic Data Systems Federal Corporation, each of which is subcontracting the actual printing of the manuals. GPO and the Army apparently have recognized all along that the terms of the RFP were such that they could be met only by an ADP firm. See Program 600-S Preproposal Conference: Questions and Answers at 21-22.

The bulk of the RFP calls for creation of up to 200 local area networks, each with data and graphics processing capacity, and the creation of a master data base of all Army manuals. The RFP includes such traditional ADP equipment as "word processors," "textual scanners," "graphic editorial devices," "sophisticated terminals," 'microcomputers or terminals," "electronic files," an "automated distribution and mailing system, a "central electronic library," an "electronic mailbox," and "a device that can translate digital data from a variety of other devices and allow the manipulation of that data as though it was created on the contractor's proposed system." RFP at 56-60. Most of the equipment which will be used on the system will be installed directly at Army sites and will come directly from GSA Federal Supply Schedules for ADPE (Group 70).

The ADP is also clearly severable from the actual printing, as GPO and the Army have admitted. See Program 600-S Preproposal Conference: Questions and Answers at 21-22 ("Q. Could not the commercial printing and binding needs of a contract be handled under a separate contract? . . . A. Part 1 - Yes, it could.").

GPO's attempt to characterize this vast data processing network and data base management system as a simple "printing" contract is merely a tactic to avoid compliance with the Brooks Act.

C. Conclusion

GPO's attempt to inject OMB into the middle of an ongoing bid protest proceeding is unwise, inappropriate, and contrary to the procedures for resolving protests set forth in the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984). The GSBCA is a forum for the resolution of bid protests relating to the procurement of automatic data processing ("ADP") resources, and has authority to review all violations of law and regulations. See 40 U.S.C.A. § 759(h). Review of GSBCA determination is specifically and exclusively vested in the United States Court of Appeals for the Federal Circuit. 40 U.S.C. § 759(h)(6)(A); 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(10).

For the reasons outlined above, and stated at more length in the accompanying briefs, the position taken by GPO is meritless. Principles of sound executive decision-making and good public policy counsel that OMB should refuse to allow itself to become embroiled in this proceeding, which more properly should proceed before the GSBCA and the Federal Circuit.

Very truly yours,

Irwin Goldbloom
Latham, Watkins & Hills
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T F Williamson

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Sciences, Inc.)

Enclosures

APPENDIX 7.—LETTER FROM DONALD C. HOLMES, ATTORNEY FOR ELECTRONIC DATA SYSTEMS FEDERAL CORP., TO OME DIRECTOR JAMES C. MILLER III, FEBRUARY 27, 1986

JONES, DAY, REAVIS & POGUE
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February 27, 1986

The Honorable James C. Miller, III
Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503

Re: Request of Ralph E. Kennickell, Jr.
Public Printer of the United States,
Dated February 3, 1986, to OMB

Dear Mr. Miller:

This firm represents Electronic Data Systems Federal Corporation (EDS) the successful bidder on the 600-S Contract which is the subject of Mr. Kennickell's letter to your office.

Our understanding of the law is that the Office of Management and Budget makes decisions concerning disputes between federal agencies relating to the applicability of the Brooks Act, 40 U.S.C. § 759(g), to specific procurements made by federal agencies. Such a dispute now exists between the General Services Administration ("GSA") and the Government Printing Office ("GPO"). GSA has initially taken the position, after award, that EDS' Contract is Brooks Act covered. GPO has taken an opposing position.

The legal issues surrounding this GSA-GPO dispute have been thoroughly briefed to the United States District Court for the District of Columbia. In its opinion, the District Court specifically deferred to OMB's decision as to whether the 600-S Contract should have been procured under Brooks Act procedures. We attach EDS' two briefs to the District Court (Ex. 1) and a highlighted District Court decision relating to OMB's decision making authority. (Ex. 2) The brief of the defendant, GSA, is also attached and we have highlighted several sections of it which we believe are particularly important. (Ex. 3)

EDS wishes to emphasis several points relating to the 600-S Contract for your consideration:

1. The Present Contract Requirements. The requirements of the solicitation (except for its magnitude) are consistent with customary printing contracts regularly procured by the GPO. The photocomposition element or the electronic setting of type (before printing and binding takes place) has become the subject of special computer tools over the last decade. Computer tools are now used in part to accomplish typesetting, and typesetting is an integral part of printing since nothing can be printed without the composition of the type.

Computer technology is used to achieve the end product -- a published page of text -- but this is not the purpose of the acquisition. The government is acquiring the printed page, not the technology which created it. *See* copy of Affidavit of Kim Luke, attached. (Ex. 4)

Photocomposition (and printing) utilizing computer tools have been the subject of numerous GPO procurements for the past 15 years. Despite the use of these tools, none of these contracts was placed under a delegation of ADPE authority from the GSA. As a result, in this case the GPO had no reason in law or fact to seek or obtain a delegation of GSA authority for procurement of the computer-aided photocomposition element of 600-S, which element represents only a modest part of the overall contract for integrated printing and publishing services. Of the total evaluated price offered by EDS, less than twenty-three percent represents the service charge for ADPE which is used in part in providing the printing services and which is physically located on and maintained at government facilities. The balance of EDS's price offer is for contractor site printing, on-site copying equipment, binding, mailing, and the like. See copy of Affidavit of Kim Luke, attached. (Ex. 4) The government is not buying or leasing any ADPE from EDS.

The three protestors would have one believe that an "ADPE procurement" occurs every time any federal agency purchases an item in which computers are utilized to "manufacture" an end item. Taking the protestors' argument to its logical conclusion, if the government issued a solicitation for on-site banking or credit union facilities, and required, as part of the technical specifications, that transactions be accurately recorded on a real-time basis and that account balances be available to depositors on demand (both of which capabilities are made possible by the use of computers located in government facilities), the government has conducted an "ADPE procurement." This is obviously wrong. So is the allegation that this printing and publishing contract is an ADPE procurement merely because computerized tools are used in the production, printing and binding of training manuals and other forms of publications for the Army's use.

EDS, and undoubtedly others, have chosen to use ADP equipment as tools to support and satisfy some of the performance requirements of this contract with GPO. However, the methods of satisfying those requirements are left to the individual offerors. In theory, if an offeror could utilize 40,000 scribes with quill pens (to use an absurd example) and could still satisfy the quality, quantity and timeliness of performance requirements, there is no prohibition against that for most of the work called for by the RFP. Obviously, any product manufactured in today's marketplace must utilize computer technology to be competitive, and EDS (and it assumes other offerors) have so proposed. It cannot be reasonably argued, however, after reviewing the RFP in detail, that this is anything but a contract with GPO for printing and publishing services. This is supported by the Affidavit of L. Mills Davis, copy attached. (Ex. 5)

There is nothing being done now in the photocomposition area of this contract that was not done twenty or thirty years ago by paste-up techniques. Composition is now taking place on a screen so that it can in turn be more efficiently made into camera-ready copy for the actual printing process. The printing process (as with the manufacture of automobiles, machine tools and other equipmment) is controlled by specialized computer equipment.

Moreover, EDS (as other publishers have done) has taken steps to ensure that the computer tools which it is using in providing printing and publishing services under this contract are not misused for any other purpose, including general purpose operations. EDS attaches a copy of a January 27, 1986 Affidavit of Kim Luke, EDS' Technical Director, which makes it clear that EDS has undertaken protective action in its design to ensure that the computer equipment is only used for the specializied publishing functions for which it was designed and intended. (Ex. 6) EDS (as with other offerors) must do this to protect its cost-position in this procurement. If the equipment were utilzied for other than specialized publishing purposes, it would significantly increase an offeror's maintenance costs and related support costs for this project. In short, there is no reasonable way that an offeror could provide other than specialized printing and publishing services under this contract without incurring an economic burden which would make it totally non-competitive.

2. *The Position of the GSBCA on OMB's Statutory Authority*. EDS respects the authority of OMB to decide interagency disputes concerning Brooks Act coverage. As a further indication of the fact that the GSBCA has gone far beyond its limited jurisdiction under the Brooks Act, we wish to bring to your attention the GSBCA's negative statements regarding OMB's authority:

> Thus, *it is the Board which is to determine whether the protested procurement is conducted under the authority of the Brooks Act*. This interpretation of the Brooks Act as a whole does not read out of the law the policy and fiscal control of OMB. We do not decide here whether OMB has the authority to resolve any dispute concerning whether a DPA must be obtained, *but even if it does have such authority, that does not make a difference here*. Once a protest is filed, part and parcel to this Board's protest authority is its ability to determine its jurisdiction, which requires a finding as to whether the Brooks Act is applicable to the procurement. *This Board is not bound to OMB's view of the matter.* *SDA Federal Systems, Inc.*, GSBCA No. 8180-P, 85-3 BCA ¶ 18,493 at 92,868 ("[Respondent] offers no explanation of how it could be that OMB has any appellate role whatsoever *vis a vis* this Board in the litigation of protests, nor do we see how that could be the case. *We answer to the Federal Circuit* in protests just as we do in cases under the Contract Disputes Act of 1978, ... *See* 40 U.S.C. § 759(h)(6)(A)"). *Thus, the fact that the GPO has now referred the question to OMB is not determinative*. (Emphasis added.)

Protest of *Xerox* & *Volt*, GSBCA No. 8333-P and 8336-P, opinion dated February 4, 1986.

> Once we conclude that *we are not constrained by an OMB decision* and examine the merits of the question, we come out precisely where we did before. *There has been such an erosion in the underpinnings of the OMB decision that we doubt very much whether even OMB would rule today as it did back in 1976*. The decision has long since been overtaken by events, for reasons our *SMC* opinion spells out. We see no reason to abandon our *SMC* holding. (Emphasis added.)

Protests of SDA Federal Systems, GSBCA No. 8180-P, 85-3 BCA ¶ 18,493.

These statements by the GSBCA are incorrect and contrary to the statutory plan set out in the Brooks Act for resolution of good faith interagency disputes, such as the current one between GSA and GPO. They should be corrected by OMB which has final legal and policy authority in this area of dispute.

3. The Motivation of the Disgruntled Bidders. We would like simply to point out the motivation of the three protestors who have challenged this procurement. Xerox, AT&T and Volt are all disgruntled bidders who lost a fairly conducted procurement to EDS. Having lost, they are now bent on doing anything to kill the award properly made to EDS. Their allegations in District Court, and before the GSBCA concerning the Brooks Act and its alleged application to a GPO procurement of printing and publishing services conveniently overlooks one important fact. They themselves participated for over a year in the procurement in question. They never once raised the issues that this procurement "should have been" conducted under the Brooks Act. These three protestors knew from publication in the Commerce Business Daily, (October 18, 1984) and from the solicitation document itself that a straightforward procurement for printing and publishing service was at stake, and that the Brooks Act was not involved. They had public notice of the fact that GSA was not conducting this procurement, either

directly or by delegation. 45 Fed. Reg. 26178 (1981). They participated fully in the procurement and lost.

The real point that these three protestors are raising is a desire to recompete for a procurement that they lost after an open and fair competition. EDS was the lowest cost offeror with the highest technical score. The protestors have already received substantial materials from the GPO which show that the allegations that they are raising on the merits in the case are groundless. In addition, EDS states, as it has repeatedly,that it is not concerned about the allegations that are made against it or GPO on the merits. It is ready to prove, in a forum with jurisdiction, that the award of this contract to EDS was completely proper. EDS' objection is that the protestors are attempting to have that decision made in the GSBCA which clearly has no jurisdiction to make it. Their proposed course will simply make for duplicative proceedings which will cause EDS as well as other government agencies, such as GPO, substantial harm and increased costs in being required to defend this award once and then a second time in a forum authorized by law to make decisions about awarded contracts.

If the three protestors, notwithstanding the information that they have been provided to date, still believe that the 600-S award was inappropriate, the law permits them to make those allegations, and have a full hearing, before either the General Accounting Office or the United States District Court. They thus have ample remedies at law.

The three protestors now contend to have made a startling after-the-fact "discovery": that printing and publishing services that utilize computer tools are now allegedly an ADP procurement subject to the Brooks Act. Yet, they have known for over one year that the GPO made a contrary good faith determination and did not consider the 600-S Contract to be Brooks Act covered. It is indeed remarkable how their "new found knowledge" coincides with their loss of the procurement on both cost and technical scores.

4. Findings Which OMB May Make. EDS submits that after a full review of the record, OMB may make the following findings:

a) The 600-S procurement is a printing and publishing contract;

b) GPO did not obtain a delegation of procurement authority from GSA because it fairly and reasonably considered itself exempt from any such requirement;

c) GPO properly requested a review by OMB of GSA's initial "determination" after the 600-S Contract was awarded, that the contract was for ADPE services;

d) Determinations by any federal agency relating to the coverage of the Brooks Act are subject to review and decision by the OMB as recognized in statute and regulations, 40 U.S.C. § 759(g) and FIRMR 201-1.102-2(b)(c);

e) OMB need not address the allegations of how the procurement was conducted; that is a matter for the GAO, the United States District Court, or other tribunal outside the Executive Branch;

f) In conducting its review, OMB can review not only statutory interpretation issues but also the current fiscal and policy perspectives relating to this procurement; [p.6 of the December 9, 1975 letter of OMB to Honorable Jack Eckerd of GSA, hereafter Reference 1,];

g) The fact that the method and manner of performing the 600-S Contract was left totally to the discretion of the individual contractor itself removes the 600-S Contract from coverage of the Brooks Act.;

h) Simply because computer tools could be utilized to perform a portion of the tasks involved in the 600-S printing and publishing requirements is not determinative because all manufacturing operations today involve the use of computer tools to some degree;

i) Because GPO fulfills the Government's printing and publishing function, and it has expertise in purchasing efficient printing and publishing services "it is not apparent" that the purposes of the Brooks Act would be significantly served by an interpretation of the definition of ADP which would include printing and publishing services. [p.9., Reference 1]

j) No economies would be realized for volume procurements of the 600-S procurement because this is a unique contract for services, competitively procured, under a fixed-price contract; decisions on whether to purchase or lease are not relevant for the same reason; sharing of services is not relevant since the contractor's price is fixed price per unit;

k) Thus, there is no apparent benefit to GSA involvement in this procurement from a cost, efficiency or policy point of view.

* * *

GSA has taken the position in the District [illegible]

is in [illegible]

need to seek or request any delegation from GSA for this procurement. That alone should be determinative of this matter.

Even if it is not, and the OMB believes that a dispute exists between GPO and GSA over whether the 600-S Contract is Brooks Act covered, the OMB is fully authorized under statute to resolve this inter-agency dispute.

OMB should take affirmative action on GPO's request because a decision by the GSBCA to take jurisdiction of these protests would effectively usurp the control and authority of the President and his delegate, the OMB, in this and similar interagency matters of importance.

We hope that the foregoing materials are useful to your office in its decision making process.

Very truly yours,

Donald C. Holmes

Attorney for Electronic Data Systems
Federal Corporation

Attachments

List of Exhibits

1. Response to Defendant's Motion To Transfer and Intervenors' Opposition to Motion For Preliminary Injunction, February 18, 1986

   Plaintiff's Memorandum of Points and Authorities In Support of Its Application for Temporary Restraining Order Preliminary and Permanent Injunctive Relief, February 7, 1986

2. United States District Court Orders, February 19, 1986
   February 21, 1986

3. Government's Motion to Transfer, February 14, 1986

4. Affidavit of Kim Luke

5. Affidavit of Mills Davis, January 28, 1986

6. Affidavit of Kim Luke, January 27, 1986

APPENDIX 8.—JOINT MOTIONS BY COUNSELS FOR XEROX, AT&T, AND VOLT TO CONSOLIDATE CASES AND TO EXPEDITE CONSIDERATION OF CASE NO. 86-974, MISC. NOS. 103, 104, MARCH 6, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION, Plaintiff,	Case No. 86-974 (On transfer from the Unied States District Court for the District of Columbia)s
v.	
THE GENERAL SERVICES ADMINISTRATION, and	Misc. Nos. 103, 104
THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS, Defendants.	(Petitions for Mandamus to the General Services Administration Board of Contract Appeals)

CERTIFICATE OF INTEREST

Xerox Corporation, by its undersigned attorneys, submit the following statement in compliance with Rule 8 of this Court:

(a) Xerox Corporation;

(b) Not applicable;

(c) None;

(d) Latham, Watkins & Hills
1333 New Hampshire Avenue, N. W.
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Dated: March 6, 1986

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION,

Plaintiff,

v.

THE GENERAL SERVICES
ADMINISTRATION, and

THE GENERAL SERVICES
ADMINISTRATION BOARD OF
CONTRACT APPEALS,

Defendants.

No. 86-974
Misc. Nos.
103 and 104

JOINT MOTIONS TO CONSOLIDATE CASES AND TO EXPEDITE CONSIDERATION

Xerox Corporation ("Xerox"), AT&T Technologies, Inc. ("AT&T"), and Volt Information Sciences, Inc. ("Volt"),*/ move this Court to consolidate case No. 86-974, Misc. No. 103 and Misc. No. 104, and to expedite consideration of these cases.

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*/ Xerox, Volt and AT&T are protesting parties before the GSBCA. Xerox Corp., GSBCA No. 8333-P et al. That proceeding is the subject of the petitions for writ of mandamus before this Court as Misc. Nos. 103 and 104. Xerox, AT&T and Volt intervened as defendants in the suit before the District Court, *Electronic Data Systems Federal Corp. v. General Services Board of Contract Appeals, et al.*, No. 86-0353, which was transferred to this Court by the District Court and is before this Court as 86-974.

Each of these cases involves review of the same decisions by the General Services Board of Contract Appeals (the "Board") in the bid protest proceedings styled Xerox Corp., GSBCA Nos. 8333-P and 8336-P. Case No. 86-974 is an injunction proceeding which was originally brought in the United States District Court for the District of Columbia. The case was filed by Electronic Data Systems Federal Corporation ("EDS"), the successful offeror, and was supported, as amicus curiae, by the Goverment Printing Office ("GPO"), the respondent in the GSBCA proceedings. The plaintiff in that case essentially sought to (1) enjoin the General Services Board of Contract Appeals from proceeding with its adjudication of these protests, and (2) suspend operation of the suspension order issued by the Board pursuant to 40 U.S.C.A. § 759(h)(3)(B). Briefs were filed on the request for a preliminary injunction, but no hearing on that motion was held and no merits determination was made. The District Court, after a hearing on an application for a temporary restraining order, determined that it did not have jurisdiction over the complaint, because jurisdiction to review determinations of the Board is vested exclusively in this Court. Electronic Data Systems Federal Corp. v. GSA, No. 83-353 (D.D.C. Feb. 21, 1986). The District Court accordingly transferred the complaint and the related papers to this Court pursuant to 28 U.S.C. § 1631.

. Miscellaneous No. 103 and Miscellaneous No. 104 are mandamus petitions, filed in this Court, seeking to have this Court direct the Board to stop its proceedings, and to dismiss the case, on the grounds that the Board lacks jurisdiction to hear this dispute. These petitions were also filed by EDS and GPO.

All of these cases seek review of the same actions of the Board. They all have, at their core, the allegation that the Board is without jurisdiction to entertain the protest proceedings filed by Xerox, AT&T and Volt. The legal arguments raised as to the legal status of the GPO, the nature of this procurement, and the effect of GPO's failure to obtain procurement authority, are common to each of these proceedings. The cases involve the same participants. The ultimate relief sought in each of these cases, is, in effect, termination of the Board's proceedings prior to a hearing on the merits.

Consolidation of these cases will permit all of the legal attacks on the Board's jurisdiction to be combined in a single proceeding. Combining the issues will result in streamlining these proceedings, will permit the parties to address each issue clearly, will allow the case to proceed in the most expeditious manner, and will conserve judicial resources.

Xerox, AT&T and Volt also move, as a condition to the motion to consolidate, this Court for an order to expedite consideration of these proceedings. The legal issues raised by the petitions for mandamus have already been fully briefed by the petitioners. The Court should schedule the consolidated proceedings in the manner specified for mandamus proceedings. Xerox, AT&T and Volt are prepared to respond to the entire range of issues presented to this Court in the context of the mandamus cases and respectfully suggest that their responsive briefs be considered as the briefs in opposition to these consolidated proceedings; that EDS, GPO and the United States be given an opportunity to reply seven davs after receipt of the opposition briefs and that the Court set this consolidated case for oral argument at the earliest convenient time for the Court, and before the end of March, 1986.

The basis for expedited treatment of this matter is manifest. In Section 2713 of the Competition in Contract Act of 1984, 40 U.S.C.A. § 759(h), Congress mandated that protest proceedings of this character be promptly adjudicated by the Board so as to protect the public interest in fair and competitive procurement of government automatic data processing resources. The continued performance of the contract at issue without a prompt resolution of this controversy will thus deprive Xerox, AT&T and Volt of their rights.

These proceedings have resulted in stopping an on-going adjudicative procedure in the middle of discovery. It is important that these attacks on the Board's jurisdiction be disposed of promptly, so that the case may expeditiously be remanded to the Board to continue its proceedings.

The above motions to consolidate and expedite are made without prejudice to the pending Motion by AT&T for Reconsideration of Stay Order and for Remand of Proceedings to the General Services Board of Contract Appeals, and the pending Motion by Xerox to Reconsider Order Granting Stay and Extension of Temporary Restraining Order, Motion to Vacate Temporary Restraining Order, and Motion to Remand for a Suspension Hearing; and without prejudice to the argument to be made by Xerox, AT&T and Volt in these cases, that the issues raised are not ripe for decision by this Court.

Respectfully submitted,

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Counsel for Volt Information
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Dated and Filed: March 6, 1986.

CERTIFICATE OF SERVICE

I, Franklin G. Snyder, certify that on this 6th day of March, 1986, I had hand delivered the foregoing to:

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Franklin G. Snyder

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION,

Plaintiff,

v.

THE GENERAL SERVICES
ADMINISTRATION, and

THE GENERAL SERVICES
ADMINISTRATION BOARD OF
CONTRACT APPEALS,

Defendants.

Case No. 86-974

(On transfer from the
United States District
Court for the District
of Columbia)

Misc. Nos. 103, 104

(Petitions for
Mandamus to the
General Services
Administration
Board of Contract
Appeals)

MOTION TO RECONSIDER ORDER GRANTING STAY AND EXTENSION OF TEMPORARY RESTRAINING ORDER, MOTION TO VACATE TEMPORARY RESTRAINING ORDER, AND MOTION TO REMAND FOR A SUSPENSION HEARING

Xerox Corporation ("Xerox")[*/] moves this Court to (1) reconsider its Order, issued March 3, 1986, granting the motions of the Government Printing Office ("GPO"), and Electronic Data Systems Federal Corporation ("EDS"), for stay and an extension of the temporary restraining order issued by the District Court, (2) vacate the temporary

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[*/] Xerox is a protesting party in the proceeding before the Board, Xerox Corp., GSBCA Nos. 8333-P and 8336-P. It was a defendant/intervenor in the case before the District Court, Electronic Data Systems Federal Corp. v. GSBCA, No. 86-0353.

restraining order to permit the Board's suspension order to remain in effect and thus prevent the completion of substantial performance under this contract, and (3) if this Court believes that serious allegations of harm have been made, to remand this proceeding to the General Services Board of Contract Appeals for a suspension hearing in accordance with provisions of 40 U.S.C.A. § 759(h)(3)(A).

The grounds for these motions are:

1. The evidence presented in support of these motions was never presented to the Board. it was presented, for the first time, in these proceedings attacking the Board's actions. The petitioners should be required to present this evidence at a suspension hearing before the Board.

2. The Government agencies involved have admitted that they cannot meet the statutory standard required for permitting a challenged procurement to proceed under 40 U.S.C.A. § 759(h)(3)(B).

3. None of the petitioners has demonstrated that significant harm will result from the Board's suspension order. The Request for Proposals itself, and the attached Declarations, refutes any allegation that the Army cannot print its manuals under the suspension order.

4. Any interim relief provided by this Court should not permit performance of the 600-S contract, since

the alleged harm can be mitigated in other ways without jeopardizing the rights of other parties by permitting substantial performance of the contract.

In support of these motions, the Court is respectfully referred to the Declarations of Henry Fry and William J. Flynn, attached hereto, and in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

Irwin Goldbloom

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Dated and Filed: March 6, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS)
FEDERAL CORPORATION,)
)
Plaintiff,)
)
v.)
)
GENERAL SERVICES BOARD OF)
CONTRACT APPEALS, et al.,)
)
Defendants.

DECLARATION OF WILLIAM J. FLYNN

I, WILLIAM J. FLYNN, state that I have personal knowledge of the facts herein, and if called upon to testify to the facts, I am willing to testify and am competent to do so.

1. I am the Executive Account Manager, U.S. Army, Federal Government Operations, Xerox Corporation ("Xerox"). In that position, it is my responsibilty to represent Xerox with respect to all of its products and services to the U.S. Army. As a corollary responsibility, I serve as a liason by which the Army communicates back to Xerox regarding its needs, interests and opportunities. In discharging this function, it is necessary for me to be intimately familiar with the Army's organizational

structure, both military and civilian, and be fully conversant with the Army's information handling requirements.

2. On behalf of Xerox, I reviewed and became familiar with the Request for Proposals ("RFP") No. 650-S issued by the United States Government Printing Office ("GPO") on December 4, 1984. I participated in the development of the proposal submitted by Xerox in response to the RFP. The period from the issuance of the RFP in December 1984 until the purported award of a contract in January 1986 consumed more than thirteen months. During this period, I was in regular contact with Army and GPO personnel, frequently on a day-to-day basis, relating to all aspects of the Army and GPO's interests and needs concerning the 600-S RFP. In order to provide the necessary liason services under the 600-S procurement, it was necessary for me to be intimately familiar with the Army and GPO's present methods of publishing their manuals and their plans for upgrading the process as well as the Government's program for the phasing-in of the new system.

3. In light of the size and scope of the 600-S contract, it was envisioned by the Army and the GPO that a long "phase-in" period would be required in order to analyze, equip, train and continue to upgrade all 200 sites that would be involved in the project. Although the RFP

called for a 60-day period of implementation after award of the contract at five selected sites, it was expected by all concerned that these "priority" sites would require an extended break-in period before substantial amounts of printing could be produced on a routine basis. In accordance with such a "phase-in period", the generally accepted estimates were that a minimum of 120 days would be required before high-volume publications could be produced. Accordingly, it was generally understood by all parties involved in the procurement -- i.e., proposers and government personnel -- that a "cross-over" method would have to be developed in order to change from the existing procedures to the methods to be employed under the 600-S contract.

As noted, there was a thirteen-month period from publication of the RFP through the purported award of the contract in January 1986. That period encompassed responses by the proposers in April 1985, questions and clarifications of responses in August 1985, and benchmark testing during October-December 1985. During this extended period of time, new as well as reprinted Army publications were handled on a priority and as-needed basis so as to meet the Army's needs. Moreover, every major command and subcommand as well as all forts and major Army installations have some method of high volume printing capacity either in the form of a printing plant or a decentralized duplication facility.

5. In light of the ability of the Army to completely fulfill its new and reprint publications needs prior to the purported award of contract 600-S in January 1986, it is hard to understand as contended by the Army and the GPO in their proceeding why priority printing and/or publications at TACOM, TRADOC, MICOM and the Marine Corps requirements cannot be met as in the past with presently available systems or by means of selected subcontracting through the private sector.

I declare under penalty of perjury that the foregoing is true and correct.

WILLIAM J. FLYNN

Executed on 3 / 5 / 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION, Plaintiff, v. THE GENERAL SERVICES ADMINISTRATION, and THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS, Defendants.	Case No. 86-974 (On transfer from the Unied States District Court for the District of Columbia) Misc. Nos. 103, 104 (Petitions for Mandamus to the General Services Administration Board of Contract Appeals)

XEROX CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO RECONSIDER, TO VACATE STAY, AND TO REMAND TO THE BOARD

Irwin Goldbloom

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Dated and Filed: March 6, 1986.

CERTIFICATE OF INTEREST

Xerox Corporation, by its undersigned attorneys, submit the following statement in compliance with Rule 8 of this Court:

(a) Xerox Corporation;

(b) Not applicable;

(c) None;

(d) Latham, Watkins & Hills, 1333 New Hampshire Avenue, N.W., Washington, D.C. 20036, (202) 828-4400

Dated: March 6, 1986

IRWIN GOLDBLOOM

STATEMENT OF THE CASE

This case involves interlocutory challenges to certain decisions of the General Services Administration Board of Contract Appeals ("GSBCA" or "the Board"), in two pending consolidated cases: Protest of Xerox Corporation, GSBCA No. 8333-P, and Protest of Volt Information Sciences, Inc., GSBCA No. 8336-P.

Before the Court are three related proceedings. There are two petitions for mandamus, Misc. Nos. 103 and 104, filed by Electronic Data Systems Federal Corporation ("EDS") and the United States Government Printing Office ("GPO"). There is also a complaint seeking injunctive relief, filed by EDS and supported by GPO as *amicus curiae*, which was brought in the United States District Court for the District of Columbia. The District Court issued a temporary restraining order, but subsequently determined that it lacked jurisdiction over the complaint, and transferred the complaint to this Court. It has been docketed as No. 86-974.

The actions of the District Court are not being reviewed in this case. Both the complaint in No. 86-914 (transferred pursuant to 28 U.S.C. § 1631) and the two mandamus petitions are before this Court as *original* matters, and they challenge actions of the Board. These proceedings seek this Court to review, on an interlocutory basis, actions of the Board.

Although the procedural posture is somewhat convoluted, the essential issues are straightforward. EDS (an intervenor before the Board), GPO (the respondent in the protests) and the United States (not a party to these proceedings) essentially seek review of (1) the Board's determination that it has jurisdiction to hear these protests, and (2) the Board's suspension of the challenged contract pending its resolution of these protests. In their instant motions, EDS, GPO, and the United States (which simply for convenience will be referred to herein as "petitioners") seek to continue the temporary restraining order issued by the District Court and to stay enforcement of the Board's suspension order, thereby permitting EDS to continue to perform the challenged contract while its lawfulness is being contested.

STATEMENT OF FACTS

The solicitation at issue in this case is Request for Proposal 600-S, issued by GPO on behalf of the Department of the Army ("the Army") on December 4, 1984. It is a five-year contract to automate the Army publications process, create a master data base of all Army manuals, create a world-wide system of local area data processing networks, install automatic data processing ("ADP") equipment, including computers, word processors, and scanning devices, at 200 Army sites around the world, and also, eventually, to print Army manuals. The contract has variously been valued at between $300 and $500 million over the five-year period.

The procurement process for the 600-S program took more than thirteen months. During that period, Army technical, training and field manuals were printed by printing contractors using conventional printing technology. Declaration of Henry Fry ("Fry Declaration," a copy of which is attached as Exhibit 4 to this memorandum). The 600-S contract specifically provided that the Government was not obligated to permit installation of any minimum amount of equipment, or to order any minimum amount of printing. RFP § K at 149. It states that not all of the Army's requirements will be satisfied by the 600-S contract. Id. It also explicitly recognizes that there are a number of existing contracts for printing the manuals involved in 600-S, and states that these contracts will be honored until their expiration and may even be extended. RFP Amend. 2 (attached as Exhibit 6 to this memorandum). These contracts are currently in force, and printing of these Army manuals is taking place under these contracts. Fry Declaration ¶¶ 7-9 (Exhibit 4). GPO also reserved to itself the right to print these manuals in-house. RFP Amend. 2 (Exhibit 6).

This is consistent with the understanding of all parties to the procurement, which was that the 600-S procurement would be phased-in gradually over its five-year term. Declaration of William J. Flynn ¶ 3 ("Flynn Declaration," a copy of which is attached as Exhibit 5 to this memorandum).

A contract for 600-S was purportedly issued to EDS on January 9, 1986. On January 16, 1986, Xerox filed a protest with the Board, alleging violations of several laws and regulations in the procurement:

1. The purported award of the 600-S contract to EDS occurred after a protest with the General Accounting Office ("GAO") had already been filed by AT&T, in violation of 31 U.S.C.A. § 3553(c)(1)-(2).

2. After the closing date for best and final offers, EDS reduced the evaluated price of its offer by more than $20,000,000 per year. GPO and the Army permitted EDS to make that price reduction -- which permitted it to undercut the other offerors' prices -- without conducting further negotiations, in violation of procurement regulations and the RFP itself. See Federal Acquisition Regulations 15.610(b), 15.611(c), 15.607(a); GPO Printing Procurement Regulations Ch. XV, § 4.C(4); RFP 600-S § B.III.a.

3. Five months after the procurement began, and after initial proposals had been submitted by all vendors, EDS hired an Army employee who had a major role in developing the 600-S project and who was serving as head of one of the 600-S evaluation teams. This evaluator was in a position to have access to the proposals submitted by competing vendors prior to the time he was hired by EDS. This gave EDS an unfair competitive advantage in the solicitation, and EDS should have been disqualified. See NKF Engineering, Inc.,

Comp. Gen. B-220007, 85-2 C.P.D. 638 (Dec. 9, 1985).

4. The system proposed by each vendor was to be tested at a "benchmark" test. EDS made major changes to its proposed system following the end of testing, so that the system actually offered by EDS and accepted by the Government was different from the system tested by the Army and GPO. Contrary to the RFP requirements, the complete system sold to the Army has never been tested, and the evaluated score of the EDS system was improperly increased by relying upon these post-test alterations.

5. EDS, unlike other offerors, never demonstrated to the Army or GPO certain critical functions required by the RFP. Its proposal therefore should have been rejected.

6. The benchmark tests performed by the Army and GPO, and the evaluation criteria and scoring system used in evaluating the offers, were vague, erroneous, inconsistent, and irrational, and they arbitrarily discriminated against certain offerors, in violation of various regulations, including Federal Acquisition Regulations 15.605, 15.606, and 15.608.

In its subsequent protest (No. 8336-P), Volt Information Sciences, Inc. ("Volt") reiterated some of these claims, and also alleged that GPO and the Army had acted unlawfully in failing to comply with the requirements of the Brooks Act, 40 U.S.C. § 759, by failing to obtain the required authority from the General Services Administration ("GSA") before undertaking the procurement. The solicitation, and the purported contract resulting from it, are therefore unlawful and void. AT&T Technologies, Inc.

("AT&T") intervened in the two protests, which had been consolidated, raising similar issues. No hearing on these issues has yet been held, and the parties are in the middle of discovery.

EDS and GPO moved the Board to dismiss the proceedings, alleging that (1) GPO was not subject to the Brooks Act, (2) the procurement at issue was not a procurement of ADP resources, and (3) any allegations that the Brooks Act applied to this procurement were untimely under Rule 5 of the Board. After full briefing and a hearing, a three-judge panel of the Board unanimously concluded that GPO was not exempt from the Brooks Act, that this procurement, on its face, was rebuttably a procurement for ADP resources, and that the protests were timely.

In the meantime, GPO sent a letter on February 3, 1986, to the Office of Management and Budget ("OMB"). GPO asked OMB to issue an opinion holding that GPO was not subject to the Brooks Act and that this was not an automatic data processing procurement. OMB agreed to give its opinion on the issue.

Having found jurisdiction, the Board held the suspension hearing mandated by 40 U.S.C. § 759(h). GPO and the Army declined to put on any evidence, and admitted that they could not meet the statutory standard for proceeding with the procurement. Suspension Transcript (Exhibit 1) at

5. The Board then suspended the procurement, ordering that all requirements which would have been satisfied under this contract not be satisfied until the protests were resolved, a period which would expire no later than 45 business days after January 16, 1986. The Board indicated that the Army was free to satisfy those requirements not covered by the contract, and was free to return to the Board with an application for relief if urgent and compelling circumstances arose. Suspension Order (Exhibit 2) at 5. The Board ordered that discovery commence immediately, and scheduled the merits hearing for March 6, 1986.

Although exclusive jurisdiction over the GSBCA is vested in this Court, EDS immediately launched a collateral attack, appealing the Board's rulings, in the United States District Court for the District of Columbia. GPO filed a brief as amicus curiae supporting EDS and urging that the Board be enjoined from continuing its proceedings. Xerox and the other protesters intervened and opposed the motion on the ground, inter alia, that review of the Board's actions was exclusively vested in this Court. Both EDS and GPO (whose motion to intervene was denied) sought a temporary restraining order ("TRO") which would stay the Board's proceedings and would lift the suspension order. On February 19, 1986, the District Court, without ruling on any of the issues raised by the litigation, issued a TRO, which halted the Board's proceedings two weeks before trial. Electronic Data Systems Federal Corporation v. GSA, No. 86-0353, 45 Fed. Cont. Rep. 332 (D.D.C. Feb. 19, 1986).

Two days later, the District Court ruled that it had no jurisdiction, and ordered the matter transferred to this Court. Although it lacked jurisdiction, it nevertheless ordered that its TRO should continue in effect until this Court could act on a motion for interim relief, or a ruling is made by OMB, or until ten days after its entry, whichever occurs first. Electronic Data Systems Federal Corporation v. GSA, No. 86-0353 (Order Granting Motion to Transfer, Feb. 21, 1986). On March 3, 1986, this Court ordered the District Court to "continue its injunction in full force and effect until further order of this Court." Electronic Data Systems Federal Corp. v. GSBCA, Misc. No. 104 (Order Granting Motions for Expedited Consideration and for Extension of Injunction, March 3, 1986).

The TRO stays operation of the Board's suspension order, in so doing, it permits significant, and potentially irreparable, changes in the status quo. Suspension orders issued by the Board halt performance of challenged contracts until the Board decides that the awards are valid, 40 U.S.C.A. § 759(h)(3), determinations which must be made in only 45 working days. Id. § 759(h)(4)(B). Since even invalid contracts "shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation," id. § 759(h)(6)(B), the suspension order is designed to freeze the status quo in order to preserve meaningful review and relief.

Petitioners seek to have this Court continue to stay operation of the suspension order, which would permit this contract to proceed at full speed. Such a stay would significantly alter the status quo by giving EDS freedom to install large quantities of additional equipment and perform work under the contract, thus potentially robbing Xerox and the other protestors of the right to adequate relief on their claims.

ARGUMENT

I

NONE OF THE ARGUMENTS AND NONE OF THE EVIDENCE RELIED UPON IN SUPPORT OF THESE MOTIONS WAS EVER PRESENTED TO THE BOARD

Before this Court, petitioners advance a battery of arguments as to why this procurement should not have been suspended pending resolution of the protests by the Board. Petitioners have proffered a variety of affidavits and declarations to show that the public interest of the United States (and EDS's pecuniary interests) is adversely affected by the suspension order. Not one of these arguments, and not one of the "facts" set forth in these affidavits and declarations, has ever been presented to the Board.

The Board is a trier of fact. Its determination "on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C.A. § 609(b). Board findings of fact, if supported by "substantial evidence," are conclusive. William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984); United States v. General Electric Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984). The Board's determinations that there are no "urgent or compelling circumstances" and that the Government is not suffering serious harm are questions of fact, which are entitled to great weight. They certainly cannot be set aside when the respondent has introduced no evidence at all.

Prior to the suspension hearing in this case, GPO and the Army announced that they did not intend to present any evidence to the Board with respect to whether the procurement at issue should be suspended. See Notice of Determination Not to Present Evidence Concerning Suspension (Exhibit 3). Under 40 U.S.C.A. § 759(h), the Board is required to suspend a procurement unless the agency demonstrates "urgent and compelling circumstances" which will not permit the agency to wait for resolution of the protests. At the hearing, GPO and the Army put on no witnesses, and offered no other evidence. Counsel for GPO and the Army admitted that the agencies could not meet this statutory standard. Suspension Transcript (Exhibit 1) at 5-6. Since the statute requires the Board to suspend the procurement unless the agency demonstrates urgent and compelling circumstances, the Board suspended the procurement. Suspension Order (Exhibit 2) at 4.

It was not until EDS launched its collateral district court attack on the jurisdiction of the Board (and this Court) that GPO and the Army unveiled "facts" which they claimed demonstrated that the public was being harmed by the suspension order. These "facts" came in the form of affidavits and declarations, signed by an Army publications officer and by an official of GPO. Not one of the facts in this parade of horribles was ever presented to the Board.

The actions being reviewed by this Court are those of the Board, not the District Court. It is "hornbook law" that in evaluating the actions of a lower tribunal, a Court of Appeals does not consider evidence which was never presented to that tribunal. See Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 784 n.4 (3d Cir. 1978) (Court of Appeals would not consider "more favorable" affidavits which had not been presented to the district court); Sound Ship Building Corporation v. Bethlehem Steel Co., 533 F.2d 96, 101 n.3 (3d Cir.), (Court refused to consider newly filed affidavit raising additional facts), cert. denied, 429 U.S. 860 (1976).

In this case, the Government deliberately decided not to put on witnesses before the Board, and not to offer any documentary evidence in support of its assertions. These witnesses, had they taken the stand, could have been examined by the Board and by opposing counsel. These documents, had they been submitted in an adversarial proceeding, could have been carefully scrutinized. The protesters would also have been permitted to introduce evidence contrary to that proffered by the Government. Instead of permitting this kind of scrutiny of their case, GPO and the Army chose to stonewall the Board and create a factual record, for the first time in their petitions for mandamus and injunctive relief.

Nor did petitioners even ask the Board to do what they are now asking this Court to do. At the hearing, counsel for EDS orally suggested to the presiding judge that the Board stay its suspension order, pending an interlocutory judicial appeal. The judge invited EDS to file a formal motion to that effect, which would be presented to the full panel. Suspension Transcript (Exhibit 1) at 4-5. Neither EDS, GPO nor the Army has ever done so.

Petitioners should be required to present their evidence in the first instance to the Board. This attempt to make a case before this Court that was never made before the lower tribunal is improper, and this evidence should be rejected.

II

GPO AND THE ARMY HAVE CONCEDED THAT THEY CANNOT MEET THE STATUTORY STANDARD FOR OPPOSING A SUSPENSION ORDER

Even if all of the affidavits, declarations, and arguments relied upon by petitioners were properly before this court, they are insufficient to meet the standard for suspensions of procurements set forth by Congress in section 2713(a) of the Competition in Contracting Act of 1984 ("CICA"), Pub. L. No. 98-369, 98 Stat. 1175, 1182-84, 40 U.S.C.A. § 759(h)(3). Petitioners argue that the public interest is being harmed by the operation of the suspension order. But Congress has already made the public interest determination and announced the standard for issuance of suspension orders -- and GPO and the Army have conceded that they cannot meet it.

A. Challenged Procurements Must be Suspended Unless Agencies Demonstrate "Urgent and Compelling Circumstances."

When a protest is filed within ten days after award, the Board holds a suspension hearing to determine whether the challenged procurement should be suspended pending disposition of the protests. 40 U.S.C.A. § 759(h)(2)-(3). Congress expressly directed that the Board *shall* suspend the procurement "unless the *Federal agency concerned* establishes that *urgent and compelling circumstances which significantly affect interests of the United States* will not permit waiting for the decision of the board." *Id.* § 759(h)(3)(B) (emphasis added). In stating this stringent standard, Congress enunciated a policy that, absent the most urgent and compelling reasons, challenged procurements should not be permitted to proceed until they have been found valid.

The suspension procedure created by Congress is a significant departure from the standard used by district courts in deciding whether to enjoin performance: the "balance of the equities" test. *See*, *e.g.*, *William F. Wilke, Inc. v. Department of the Army*, 485 F.2d 180 (4th Cir. 1973); 453 F.2d 890 (6th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972). Under this standard, protestors were rarely successful in enjoining performance of a contract, and contracts were often substantially performed by the time a decision was rendered.

Thus, the Board's suspension procedure is designed to minimize the kind of situation -- common in pre-CICA cases -- in which protestors proved that agency actions were unlawful or unreasonable, but were denied relief because the contract had been substantially performed while the protest was pending. See, e.g., Simpson Electric Co. v. Seamans, 317 F. Supp. 684, 688 (D.D.C. 1970) (although it was illegal not to award contract to plaintiff, Court denied relief where work had begun); Wadell Engineering Corp., 60 Comp. Gen. 11, 14-15, (1980) (although agency had no "rational basis" for decision, substantial work had been performed, and resolicitation would result in even more expense); EMI Medical, Inc., 59 Comp. Gen. 269, 273 (1980) ("award should have been made" to protestor, but substantial costs had been incurred and delay would result, so no relief granted); Cohu, Inc., 57 Comp. Gen. 759, 767 (1978) (protestor "was improperly denied the right to compete for the contract," but could not get relief since half of contract already had been performed).

Moreover, the suspension -- which lasts up to 45 business days -- ensures that agencies cannot evade procurement laws and regulations by rushing forward with performance while a protest is pending. It prevents contractors from reaping the benefits of unlawfully awarded contracts. And it minimizes the damages that the Government would have to pay if the contract is found to be improperly awarded, and the Government must terminate for convenience.

Congress has mandated suspension unless the statutory standard is met. This Court's review of the Board's order must be premised on that standard.

B. GPO and the Army Have Admitted That They Cannot Meet this Standard.

As noted above, counsel for GPO and the Army was questioned directly by Judge LaBella at the suspension hearing, and explicitly admitted that the agencies could not meet the standard set forth in 40 U.S.C.A. § 759(h)(4)(B). Suspension Transcript (Exhibit 1) at 5. The Board accordingly issued a suspension order. The Board, however, specifically invited the agencies to return at any time if they could demonstrate urgent and compelling circumstances. Suspension Transcript (Exhibit 1) at 7-8. Neither agency has done so.

Before this Court, the petitioners have attempted to demonstrate a variety of "facts" by way of affidavits and declarations, and they make a variety of arguments that they are harmed by the suspension order. Nowhere, however, do they allege that these "facts" or arguments were unknown to them at the time of the suspension hearing, when they admitted that they could not meet their statutory burden. Nor do they attempt to argue that these facts or arguments demonstrate "urgent and compelling circumstances which significantly affect interests of the United States" and which "will not permit waiting for the decision of the board."

Having conceded that they cannot meet the statutory standard, petitioners seek to have this Court apply a different standard to suspension orders than that mandated by Congress in 40 U.S.C.A. § 759(h)(3)(A). The standard they seek is that used by district courts in granting injunctions, a standard which, as noted above, Congress did not adopt in creating the suspension procedure. Petitioners must argue, in essence, that while a party opposing a suspension order must meet the "urgent and compelling" standard, a party seeking to can obtain a stay of such order by showing that a balance of the equities favors it. Petitioners want this Court to use a different standard in reviewing suspension orders than that which Congress has mandated the Board to use in issuing them. They thus seek to have this Court strike a different policy balance than that struck by Congress in enacting CICA.

Contrary to petitioners' suggestions, this is not a case of a stay pending appeal. It is, instead, interlocutory review, by way of mandamus and a request for injunctive relief, of an order issued by the Board pursuant to a specific statutory provision, and pursuant to specific standards set forth in that provision. The order must be evaluated by the standards enunciated by Congress.

Moreover, the suggestion by GPO that where "a military branch determines . . . that delay of its contract would impair the national interest," this Court must rubber stamp that determination, GPO Memo at 10 n.3, seriously misinterprets the law. Congress did not entrust the Army with the decision whether to stay a procurement. Indeed, Congress has frequently and strenuously objected to the Army's repeated attempts to evade procurement reform legislation, and has expressly refused to grant it such discretion. See, e.g., H.R. Rep. No. 71, Part III, 97th Cong., 1st Sess. 31-32, reprinted in 1981 U.S. Code Cong. & Ad. News 1828-29. Congress gave suspension authority to the Board. Neither this Court nor the Board is interfering in military affairs when it carries out Congress's explicit mandate to ensure that the Army obeys the law.

Since neither GPO nor the Army has met the standard created by Congress, the suspension order should not be stayed.

C. EDS's Arguments Against the Suspension Order are Irrelevant.

The arguments advanced by EDS about the harms it suffers by not being permitted to rush forward with this contract are simply irrelevant in the context of a suspension order. Congress did not state in CICA that performance of contracts should proceed when it was in the interest of the putative awardees to do so. Instead, it expressly determined that a challenged procurement must be suspended unless the Federal agency affected can show urgent and compelling circumstances which significantly affect the interests of the United States. 40 U.S.C.A. § 759(h)(3)(B). None of the "harms" suggested by EDS affect the interests of the United States. No provision of CICA, and nothing in its history, suggests that the decision to suspend a procurement depends upon the pecuniary interests of the successful offeror.

EDS's position assumes that it has a right to perform this contract, and a right to do so immediately. But "a citizen has no right to a Government contract, and a bidder has no Constitutionally protected property interest in such a contract." ATL, Inc. v. United States, 736 F.2d 677, 683 (Fed. Cir. 1984) (citing Transco Security, Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981)). Moreover, EDS has no "right" to perform this contract; the Government can terminate this contract for convenience at any time. See United States Government Printing Office Contract Terms No. 1, § 2-17; United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); 29 Comp. Gen. 36 (1949). It may terminate, suspend, or breach the contract, and and it may cause harm to EDS, but EDS's remedy for such actions is limited to money damages. EDS has no right to specific performance of its contract. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

It is axiomatic that anyone who enters into a Government contract does so subject to the laws of the United States. EDS's contract is subject to CICA, which provides, in essence, that any contract may be suspended pending resolution of a protest, either by the Board, under 40 U.S.C.A. § 759(h)(3)(B), or by the Comptroller General (whom even EDS concedes has jurisdiction) under 31 U.S.C.A. § 3553. EDS therefore was awarded its contract subject to the condition that it might be suspended pending resolution of a protest. If EDS did not like the conditions imposed by the procurement laws, it was free to decline to submit a proposal. See Household Goods Carriers Bureau, Inc. v. United States, No. 84-5836 (D.C. Cir. slip. op. Feb. 2[illegible], 1986). Moreover, even if this suspension imposed costs or duties upon EDS in excess of those called for in the contract, it has a remedy under the Changes clause. See Government Printing Office Contract Terms No. 1, § 2-2 (1980).

Petitioners' quarrel is with Congress, not with the Board. They do not like having their procurement decisions scrutinized by a forum, like the Board, with de novo review powers and adequate discovery tools. They certainly do not like the suspension standard that Congress has crafted. But they cannot avoid Congress's standard by asking this court to use a different one.

III

NONE OF THE "HARMS" IDENTIFIED BY PETITIONERS HAS ANY BASIS IN FACT

As demonstrated above, the proper standard for issuance of suspension orders is not "irreparable harm," but "urgent and compelling circumstances which significantly affect the interests of the United States." Even if petitioners were correct, however, in alleging that irreparable harm is the standard, they have failed to demonstrate it.

A. The Army Has Demonstrated No Irreparable Harm.

For demonstrating harm to the Army, petitioners rely on the Declaration of Colonel Raymond Franklin Milwee, Jr. ("Milwee Declaration"). Colonel Milwee is the Army publications officer in charge of this procurement. His declaration is founded on the fundamental misconception that the suspension order issued by the Board prohibits the printing of all Army training, technical and field manuals. Milwee Declaration ¶¶ 4-6. This is not true.

The 600-S contract is a "requirements" contract, but it specifically provides that "The Government shall not be required to purchase from the contractor any requirements except those ordered by the issuance of print orders." RFP § K at 149. It also explicitly states:

> Program 600-S is predominantly a contract for technical, training, and related literature. The Government is presently under contract with several firms for the printing or creation of many of these publications. All existing contracts will be honored until they expire and some may be renewed until such time as they can be accomodated under Program 600-S.
>
> The estimated quantities in the basis of award are not the total requirements of the Government. The Government reserves the right to produce like (similar to those described in this requirement) products and services in Government facilities, and/or to honor other contractual obligations for similar products and services which may otherwise be procured under this contract.

RFP Amend. No. 2 (Exhibit 6). The RFP thus explicitly refutes the allegations of the Army and GPO. It recognizes that: (1) there are existing contracts for printing Army training, technical, and field manuals; (2) obligations under those contracts will be honored, and such contracts may even be extended; (3) the Government has requirements for these publications which are not included in 600-S; and (4) GPO reserved the right to perform this work in-house.

The attached Fry Declaration demonstrates that there are many current requirements contracts in effect which cover the printing of Army technical, training and field manuals. Fry Declaration ¶¶ 7-8 (Exhibit 4). Both before and after the award of the 600-S contract, these

contracts were used to print these manuals. Id. ¶ 9.[*/] Since the Board made it clear that requirements which are to be satisfied under other contracts are not affected by its order, Suspension Order (Exhibit 2) at 5, petitioners err in asserting that the suspension order prevents the printing of all, or even most, publications.

The implication that all printing of these manuals would immediately have been performed under the 600-S contract is also entirely contrary to the basic assumption underlying 600-S, which is that the contract would be phased in over time. RFP Amend. 2; Fry Declaration ¶ 14 (Exhibit 4); Flynn ¶ 3 (Exhibit 5).

Army printers are operating under current contracts, and are fully capable of adequately printing any manuals which the Army believes are urgently required. Fry Declaration ¶¶ 8-9, 14-15 (Exhibit 4). Moreover, during the 13 months of this procurement, current printers were perfectly capable of addressing the Army's printing needs. Flynn Declaration ¶ 4 (Exhibit 5). And the Army commands themselves have extensive capacity for high volume printing which is capable of producing these manuals. Id. There is no evidence that any important manual cannot be printed by GPO, by the Army, or under the existing Army manual printing contracts.

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*/ Since the date the Fry Declaration was signed, GPO has cancelled a print order under one of the contracts in effect. Letter to Fry Communications from J. T. Smith, Acting Manager, Printing Procurement Department, received March 5, 1986.

Colonel Milwee, in his declaration, also refers to a growing "backlog" of publications caused by the suspension order. Milwee Declaration ¶ 9. He does not allege, however, that this backlog itself causes the Army any harm. As noted above, this backlog is caused by the misinterpretation of the suspension order; it certainly can be dealt with under existing contracts. In any event, the Army has not even alleged that it would have any serious problem in dealing with this backlog once these protests have been resolved.

Finally, Colonel Milwee makes a variety of vague allegations that the delay in printing these manuals would adversely impact the Army. Milwee Declaration ¶¶ 7-8. Even if these manuals were delayed, none of his assertions are supported by any factual averments. Moreover, GPO and the Army specifically told the Board that these problems did not "significantly affect interests of the United States"; Colonel Milwee's unsupported suggestions must therefore be regarded as not rising to that level of significance.

B. GPO Will Suffer No Irreparable Harm From Suspension.

For harm to GPO, petitioners rely upon the Affidavit of Samuel Bruce Scaggs ("Scaggs Affidavit"). This

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affidavit is rooted in the same misrepresentation as the Milwee Declaration, i.e., that "all printing of Army technical, training, and field manuals done in-house at GPO must be terminated," and that "no printing of Army technical, training and field manuals can be performed by contractors" under other existing printing contracts. Scaggs Affidavit ¶ 8. The Affidavit provides no basis for that conclusion, which, as demonstrated above, is entirely incorrect.

GPO itself can identify no harm that it will suffer. It suggests that if printing is delayed, it "might well increase the price of that printing." Of course, it "might well" not. In any event, pecuniary loss which an agency might suffer through a short delay is not the kind of irreparable harm which justifies interference in an ongoing administrative proceeding.

GPO also claims that it currently is conducting several procurements which include ADP resources, and which might be held to violate the Brooks Act. Since the Board might hold GPO's actions to be unlawful, GPO argues that serious doubts are cast upon these other procurements. But GPO has the right to apply to GSA for delegation of procurement authority under the Brooks Act for these procurements, and thereupon to conduct its procurements in a lawful manner. Harm is hardly "irreparable" if it can be avoided by simply applying for authority to engage in the particular act.

Significantly, GPO has not alleged that it is harmed by not letting these contracts. The harm, if any, would be suffered by the agencies for whom the ADP procurements are being performed. See Scaggs Affidavit ¶ 9. Since none of these agencies is alleging any harm from the delay, and and since GPO provides this Court with no information as to how they would be harmed (it does not even identify the contracts) there is no basis for a finding of irreparable harm.

Finally, GPO alleges that the protest proceedings themselves irreparably harm GPO by requiring it to hire lawyers and respond to discovery, which it would very much prefer not to do. Scaggs Affidavit ¶¶ 11-14. A Federal agency, however, is not "irreparably harmed" by having to participate in litigation, even when the forum, like the GSBCA, uses the same kind of discovery tools available under the Federal Rules of Civil Procedure. See, e.g., FTC v. Standard Oil Co., 449 U.S. 232 (1980).

GPO simply makes no showing of any irreparable harm to it arising from the GSBCA proceeding.

C. The Losses Alleged by EDS are Pecuniary, And Are Compensible by Damages.

EDS advances several arguments as to why it will be irreparably harmed by not being permitted to perform this contract immediately. All of the EDS's "harms," however, revolve around the fact that, in the long run or the short run, it will be harmed financially. All of its claims arise out of its contract, and any losses it suffers are compensible by equitable adjustments. As noted above, EDS cannot get specific performance of this contract, and it is not entitled to an injunction permitting it to perform -- which is functionally the same thing -- based on a claim that the Government might not compensate it for all its prospective losses. If the Government unlawfully delays performance, EDS has a remedy under the Changes clause. See Government Printing Office Contract Terms No. 1, § 2-2 (1980).

More fundamentally, EDS has no right under this contract to any level of requirements. The Government is not obligated to purchase any particular amount of equipment or services, nor is it bound to purchase goods or services at any particular time. RFP § K. The Government specifically has reserved the right to terminate for convenience. Government Printing Office Contract Terms No. 1, § 2-17 (1980). EDS's rights, if any, and its remedies are based on its contract, and its only appropriate remedy is monetary damages.

IV

EVEN IF IT ACCEPTS APPELLANTS' ALLEGATIONS OF HARM, THIS COURT SHOULD NOT STAY THE SUSPENSION ORDER

Even if this Court determines that the newly-filed evidence of the Army and GPO raises a significant question as to harm caused by the current suspension order, it should not issue a stay of the Board's suspension order.

A. This Proceeding Should be Remanded to the Board for a New Suspension Hearing.

As noted above, none of this evidence was ever submitted to the Board. If the Board believes consideration of this evidence is warranted, it should remand this proceeding to the Board for a new suspension hearing. Such an order is within this Court's authority. See 41 U.S.C. § 609(c); 28 U.S.C. § 1295(b). At the new hearing, the Army and GPO can introduce whatever witnesses and documentary evidence they choose, and the protesters will introduce contrary evidence. The Board can then weigh the evidence and issue findings of fact. This procedure will permit the orderly resolution of these issues and will permit the Board to enter a decision based upon this evidence. This Court will avoid the problems of trying to create a factual record, for the first time in these mandamus/injunction proceedings.

B. Any Interim Relief Should be Limited to Permitting the Army to Print Manuals.

Any interlocutory relief issued by this Court should, in any event, be limited to permitting the Army to print its manuals. This Court should not permit the Army or EDS to proceed with performance of the 600-S contract; it especially should not allow EDS to proceed with the purchase, delivery, and installation of the millions of dollars of equipment called for in the contract.

The 600-S procurement covers both (1) the actual printing of Army manuals, which can be and is being done by a host of competent printing contractors, and (2) the creation of an "electronic publishing" system, which involves the development of a master publications data base, the construction of upwards of 200 data processing networks, and the installation of computers and support equipment at Army sites all over the world.

All of the harm alleged by the Army in this proceeding goes to its assertion that it cannot print its manuals under the current suspension order. Printing contractors operating under existing contracts are fully capable of satisfying the Army's printing needs, if they are not prevented from doing so by the suspension order.

Throughout the nation's history, and throughout the 13 months of this procurement, Army manuals have been published by standard commercial processes, without the novel "electronic publishing" aspects of the 600-S procurements. See Flynn Declaration ¶ 4 (Exhibit 5); Fry Declaration ¶ 13 (Exhibit 4). There is no evidence that the public interest concerns raised by the Army cannot adequately be served by simply permitting it to continue exactly what it had been doing up to January 9, 1986, the date the contract was awarded.

The 600-S contract -- especially the creation of the 200 networks and the installation of equipment at Army sites -- is not necessary to enable the prompt and efficient publication of Army manuals. The Army has not alleged that it suffers any irreparable harm from delay in putting this equipment and these networks on line. But it is the construction of these networks and installation of this equipment that increases the Government's potential costs if it is required to terminate the contract as invalid. It is these items which create the risk that the contract will be too far along to be undone if it is found to be unlawful.

Any interlocutory relief ordered by this Court therefore should not permit performance of the 600-S contract, but should be limited to permitting the Army to print manuals pending the resolution of these issues. EDS and the Army should not be permitted to proceed at full speed with installing this expensive and complex equipment, which is unnecessary to avert any harm suffered by the Army but which will significantly prejudice the rights of the protestors.

CONCLUSION

For the reasons set forth in this memorandum, the Motions of Xerox Corporation to Reconsider the Order Granting Extension of the Temporary Restraining Order and to Vacate the Stay and the Temporary Restraining Order should be granted. In the alternative, this case should be remanded to the Board for a new suspension hearing.

Dated: March 6, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

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GENERAL SERVICES ADMINISTRATION

BOARD OF CONTRACT APPEALS

- x

Protests of: :

XEROX CORPORATION : GSBCA No. 8333-P

and :

VOLT INFORMATION SCIENCES, INC. : GSBCA No. 8336-P

Solicitation No. RFP 600-S :

- x

SUSPENSION HEARING

General Services Administration
18th & F Streets, N.W.
Room 4042

Location: Washington, D. C.
Date: Wednesday, February 5, 1986

Pages: 1-62

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UNITED STATES OF AMERICA

GENERAL SERVICES ADMINISTRATION

BOARD OF CONTRACT APPEALS

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PROTESTS OF:	:	
XEROX CORPORATION	:	GSBCA No. 8333-P
and	:	
VOLT INFORMATION SCIENCES,	:	GSBCA No. 8336-P
INC.	:	
(Solicitation No. RFP 600-S)	:	
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Wednesday, February 5, 1986
Room 4042
General Services Administration
18th & F Streets, N.W.
Washington, D.C.

The Suspension Hearing in the above-entitled matter was convened, pursuant to notice, at 2:00 p.m.

BEFORE:

VINCENT A. LaBELLA
Administrative Judge

APPEARANCES:

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* * *

P R O C E E D I N G S

[2:00 p.m.]

JUDGE LaBELLA: Good afternoon. It is shortly after 2:00. I guess we can proceed.

You have switched your positions around here. I'll have to figure out where you all are.

I take it you have received the Board's decision on the jurisdictional issue, and we made every effort to get that off just as soon as we could, so that you would have an opportunity to study it before today.

I received this morning from Mr. Greenberger a notice of determination not to present evidence concerning suspension, and you have promised some explanation for that at this point.

MR. GREENBERGER: Yes.

JUDGE LaBELLA: Perhaps that would be the first order of business.

MR. GREENBERGER: Your Honor, obviously we have your decision. We are not going to go into any great detail on it.

As you know, our position is, and it continues to be, and we are not in any sense waiving it -- we affirmatively state that we want to preserve it, that we believe the Board has no jurisdiction over this dispute, and as a subsidiary matter, we believe the Board has no jurisdiction to suspend the contract.

We believe that suspension of the contract will cause irreparable harm to the Government, that it will cause irreparable harm to the public interest, and that contrarily, there is no irreparable harm that will be experienced by any other party, because the contract can be stopped, should it be ultimately found not to be a proper contract.

However, we have looked at the statutory standard that is at issue here, and based on that, we have decided not to put any evidence in.

Were it an irreparable injury standard of the kind I'm talking about, which I view as being distinctly different, we would have. But on this standard, we decided not to.

And the Board should do whatever it thinks it can do. Our position is that suspending it would not be lawful and would be wrong, but we will abide by any unsuperseded order of this Board.

And so that's our position.

JUDGE LaBELLA: Okay. I understand you to be telling me, Mr. Greenberger, that as far as GPO is concerned, that you do not believe that you can meet the standard required by our rules and the CICA for suspension?

MR. GREENBERGER: Yes.

JUDGE LaBELLA: Okay, fine.

As you know, in this sort of proceeding, to avoid a suspension, the burden is on the procuring agency, which would be the GPO here, to demonstrate that urgent and compelling circumstances do not permit the waiting for the Board's decision on the merits.

As I understood you to just tell me, that GPO's position is that that test cannot be met. That being the case, the Board hereby orders the procurement suspended, the contract suspended.

MR. GREENBERGER: Your Honor, I think that that should be made clear, what you're doing when you say --

JUDGE LaBELLA: Yes. I intend to expand on my remarks.

MR. GREENBERGER: Yes. I would just like to say, Your Honor, that we read the Board precedents and read the standard as being "urgent and compelling circumstance which significantly affects the interests of the United States and will not permit waiting for the Board." That is the standard that we read.

We have read the Board's precedents. That standard is the standard that we do not now wish to meet.

JUDGE LaBELLA: We understand one another, Mr. Greenberger.

What we have here, as I understand it, is a requirements contract, and what I am suspending here today is the contract, and I am prohibiting the GPO and the Army from satisfying any of the requirements that would be satisfied under that contract, under the suspended contract.

I would further point out that since this is a requirements contract, should the Army have any urgent requirements that come up during the course of the time it takes the Board to decide this case on the merits, the Board will allow you and the Army to make such argument at that time with respect to particular requirements which may not be foreseen right now.

Is that understood?

MR. GREENBERGER: That's understood, Your Honor. I think that as a practical matter -- I appreciate that kind of relief being offered -- I think as a practical matter that's going to be very difficult to effectuate.

I believe that, as a practical matter, this contract either has to be on or it has to be off, and as I said, if the contract is suspended, we will abide by that order as long as it's extant.

JUDGE LaBELLA: Well, what I'm suggesting is that the requirements can be justified under "urgent and compelling circumstances," and the Board might fashion some temporary relief to satisfy those requirements. It doesn't necessarily mean that they would be satisfied by way of the contract that's been suspended or under that contract. They might be able to be satisfied in some other manner.

I would leave it up to the parties, or particularly to the GPO, to make recommendations along those lines. All I'm saying right now is that, as far as the suspension is concerned, it covers all requirements that would arise under this contract. And since you may not be able to foresee all such requirements today, and should such a requirement arise in the future during the course of this proceeding, where you might be able to meet the test that you must meet with respect to that particular requirement, you are free to come in and ask for relief, appropriate relief.

MR. GREENBERGER: I understand, Your Honor.

JUDGE LaBELLA: Mr. Gorman, do you?

MR. GORMAN: Your Honor, I just want to make it clear. You are saying that the Army cannot obtain any printing for these types of publications.

JUDGE LaBELLA: Requirements that would be satisfied under this contract, okay, those requirements that are encompassed in the scope of this contract may not be procured, period, unless you come in and show that urgent and compelling circumstances exist.

MR. GREENBERGER: Your Honor, maybe I didn't understand that. That may have gone by me a little bit. I want to thank Mr. Gorman.

In other words, you are saying that the Army cannot go back and do the way it used to print its manuals before this contract went into effect?

JUDGE LaBELLA: We're talking about requirements that would arise under this contract. Those requirements are, presumably, requirements which have not yet been ordered under any contract and those which have been ordered under this contract. That's within the scope of this contract.

MR. GREENBERGER: So you are not just suspending this contract. You are suspending the Army from doing printing unless we can show that there is an urgent and compelling need to do printing?

JUDGE LaBELLA: That's correct.

MR. GORMAN: Your Honor, could I ask you to ask for comments from the Protesters here as to whether that is, in fact, what they would like to see happen in this Protest?

JUDGE LaBELLA: The Board has ruled on it, and I will be glad to here comments, if anyone has any comments at this point.

MR. GOLDBLOOM: I have nothing to add to the comments, Your Honor, in view of Your Honor's ruling.

MR. WILLIAMSON: I don't think, Your Honor, that we know enough about the Army's needs or requirements to comment on that.

JUDGE LaBELLA: Mr. Shnitzer?

MR. SHNITZER: We accept the Board's ruling, Your Honor.

There is one point that I might ask for clarification on, just to be sure, and that is, I understand the situation with respect to the contract, and my question is, are the -- I believe they are called "print orders," some of which we understood have, in fact, been issued -- are they suspended as well?

JUDGE LaBELLA: If they have been delivered and accepted by the Government, they are suspended. They are subject to the suspension order.

MR. GORMAN: Your Honor, I don't think the contract envisions requirements from the first date that it begins performance. It only applies to orders that are issued. And before we get this in concrete, could we perhaps have some time to brief you concerning the way this contract was intended to be executed?

I don't think that the Army was agreeing to place every single order under this contract from Day One. Certainly after it is implemented fully, with all the equipment delivered, et cetera, that was the way it was going to work, but not from the very beginning, because it would be impossible, I think, for any of the contractors to implement it from Day One. It takes some time to get things geared up.

Certainly the Army will continue to have printing requirements.

JUDGE LaBELLA: If the Army has printing

requirements that are urgent and compelling, you may come in to the Board and make a request that they be satisfied in some manner.

I have ruled on it, and you will get formal notice of that with a fuller explanation in writing, perhaps tomorrow.

MR. GREENBERGER: Your Honor, could you just -- I mean, really, this is more the Army's problem than it is the GPO's problem. But I would be less than candid if I didn't say that, not understanding what you said to begin with and now that it's explained, I find it a little breathtaking.

What is the rationale for not allowing the Army to do printing -- I mean, concededly not under this contract -- but just to do printing, to get its printing done in any way it can be done?

I don't see what we're -- what you're trying to -- this is, in effect, in the nature of a preliminary injunction, and I don't see what you are trying to preserve by not letting them do printing.

I really throw that out without any calculated suggestion at all. It just seems to me to be a sweeping thing that you're trying to do.

JUDGE LaBELLA: Well, the contract is rather sweeping, it seems to me. It covers -- from my reading of the contract, it covers requirements arising for the services that are described therein.

MR. GREENBERGER: Yes, but those services aren't all the printing services of the United States Army.

You know, Your Honor, I -- in some senses, I --

JUDGE LaBELLA: The ones that are encompassed within the scope of that contract is what I am suspending. If there are other printing requirements of the Army, then, fine, that would not be covered under this contract or not be performed under this contract, then those are not suspended.

MR. GREENBERGER: And the second question I have is -- that's fair enough -- the second question I have is, is why can the Army not go on printing the way it has always printed if this contract had never gone into place?

JUDGE LaBELLA: Because the Board views those requirements as part and parcel of the contract that's been suspended, because you would be breaching the contract that you've awarded, were you to go elsewhere for requirements that are mandatorily required to be performed under the contract that you've awarded.

MR. MOORE: Your Honor, my name is William S. Moore, and I have entered an appearance today. Could I speak to this for a minute?

JUDGE LaBELLA: You are representing whom?

MR. GREENBERGER: Mr. Moore is my partner, and he is going to be actively involved in this.

MR. MOORE: My point, Your Honor, is, under the statutory language of the suspension statute, it says "shall suspend procurement authority with respect to any goods or services under the contract."

Now I don't think under any interpretation of this contract -- and this contract essentially consists of the RFP and different attachments -- that printing services for the next 45 days come under the contract that was awarded. There is an immense start-up time involved here. Under no interpretation of this contract, under the Protesters' interpretations or whatever, would there be any services coming under this contract that would be performed during the 45-day period of this hearing.

So there is not only a description of types of services involved, there is a timing aspect.

JUDGE LaBELLA: Excuse me, Mr. Moore. I'm not sure that I'm following you, because I understood the contractor to say that there had been some orders placed under this contract, and they were performing at this point.

You weren't a party to those proceedings here, perhaps, and you may not know about that. But it's the Board's understanding that the contract is going forward. Orders were being placed. And those, certainly without question, are not to be delivered, if they haven't been delivered, and they are covered by my suspension order.

I am not going to argue the scope of my suspension order from the Bench. I will describe the scope of my suspension order in writing to you just as soon as I can, but I wanted you to know, as best you can right now, that this does encompass all requirements which would have arisen and be satisfied under this contract.

MR. GREENBERGER: Your Honor, I don't want to argue with you about it either. The only point is that I think that it is broader than what we thought it was going to be. But we will, as I said -- any unsuperseded order of this Board, we are going to comply with. I consider it to be, in fairness, more the Army's problem than ours, but it just strikes me as an academic matter, to be surprising.

MR. SHLAKMAN: Your Honor, may I ask a question on the suspension?

JUDGE LaBELLA: Please state your name.

MR. SHLAKMAN: It is Richard Shlakman. I am General Counsel for EDS, Your Honor.

This is a twofold question. It is anticipated that the parties on the Protesters' side and perhaps the GPO will seek judicial review of this Board's decision concerning jurisdiction.

As a matter of comity between Federal agencies, would it be appropriate to ask the Court to suspend the effectiveness of its suspension order until Monday of next week in order to permit that review to go forward, if the determination should be made to seek judicial review?

JUDGE LaBELLA: You are free to make a formal motion to that effect in writing, and it would be considered by the full Panel.

MR. SHLAKMAN: The second element of my question --

JUDGE LaBELLA: And I would suggest that you file such a motion today.

MR. SHLAKMAN: There are very few print orders which had been received by EDS which are not currently fulfilled, because most print orders only have a five-day life.

If the Protesters and the Intervenor, GSA, do not object to our simply filling the orders which are currently in hand, so that the Government can get the benefit of that which they would have to pay for, may we complete those orders that we currently have?

It seems to me, no one is served by having a printing run stopped in the middle of the presses. The Government would be obligated to pay us, and they would have nothing to show for it. I just don't know what value would be served by stopping an extant, existing print order from being completed.

JUDGE LaBELLA: Is this a hypothetical question?

MR. SHLAKMAN: No, sir. It's a real question.

JUDGE LaBELLA: Well, give me some idea of the scope of what you are talking about.

MR. SHLAKMAN: I don't want to speak lightly on the subject. There are people from the GPO who could advise me of the facts. I know that we only have a few print orders. I am not even certain there are those remaining outstanding that haven't been filled. We are not talking about anything significant, in terms of a print order.

I am sorry I am not familiar enough with the facts. In a five minute recess, I could get those.

JUDGE LaBELLA: Okay. I will permit you, in due course, to come back to that.

MR. SHLAKMAN: Thank you.

Aside from that problem, that will end the discussion of the suspension proceeding here today.

MR. GREENBERGER: Your Honor, there is just one further point. I think that just for purposes of clarification, the Order -- there may be situations where the Army has a delegation of authority from the printer to do its own printing. I don't know how that works, quite frankly. I'm not sure anybody here knows how that works.

You will have to decide how you want to scope the Order. You may want to cut that off, too, but it ought to be clear so that we know what we are dealing with. That's the only point. I think the record makes it clear that in some circumstances, JCT and the GPO can give a delegation of printing authority to an agency. I would not at all be surprised if the Army has some delegations of authority. If you want to sweep that in, we will abide by any unsuperceded Order. We want to abide by it but we would like to be told clearly what we have to abide by.

JUDGE LaBELLA: I will make every effort to be clear.

MR. GORMAN: Your Honor, one other thing. The Army is not a party to this Protest. If you could keep that in mind when you structure your Order, as to how it is going to apply to GPO versus the Army.

JUDGE LaBELLA: The Army is represented here, Mr. Gorman, as co-counsel for Respondent. The way I view this case is that there is one Respondent. It turns out that one part of Respondent is doing the procuring, the other part of the Respondent has the requirements, and they go part and parcel with one another. That is why I admitted you into this proceeding as co-counsel for Respondent.

MR. GREENBERGER: Your Honor, in fairness on that point, I thought at the beginning that when you did that, we did have a discussion. We said that Mr. Gorman could be co-counsel in the case as long as it was understood this was a GPO contract and not an Army contract.

JUDGE LaBELLA: That's quite correct, and that I expected Respondent to speak with one voice. That was my position and it still is my position. There are some aspects to this, perhaps, where the Army has more to say than GPO and GPO has nothing to say, as you have just said.

MR. GREENBERGER: That is absolutely right.

JUDGE LaBELLA: I would still want to hear the Army's point of view on that. That's why Mr. Gorman is permitted, at my suggestion, to be co-counsel for Respondent. Otherwise, we might have had some other arrangement. I think it is a workable solution.

MR. GORMAN: In my participation as co-counsel in this case, I have been careful not to take a position that I thought was inconsistent with the GPO's position because GPO is the party to the case. I see my role as co-counsel with GPO. I have an attorney/client relationship with GPO. I have not taken any positions that I thought might be --

JUDGE LaBELLA: We are getting some interference back here, and I am having trouble hearing you.

MR. GORMAN: I have been careful not to take any positions that I thought might be inconsistent with the Army's position, because the Army was not a party to this case. Now I think you are telling me that the Army is in fact -- or the Government --

JUDGE LaBELLA: The Army's views are being heard here. They have been from day one.

MR. GORMAN: If we cannot file our own filings, then the position you are hearing is GPO's.

JUDGE LaBELLA: If you have something to say, you may make a filing with respect to the areas that GPO has no inconsistent views on. There are certain areas of this, with respect to the requirements, for instance, that you have primary knowledge of, and I would expect that information to come from you.

MR. GORMAN: Through GPO, which is the way I saw it.

JUDGE LaBELLA: Right. That's fine. That is the way I want it to work. I don't see anything inconsistent about that.

MR. GORMAN: When you are suspending the Army's authority to print and not GPO's authority, to enter into this contract and issue orders under this contract, you are going much farther than the GPO and its contract, and going all the way to the Army's authority to get its printing done.

JUDGE LaBELLA: Perhaps you will understand it a little better when you see it in writing.

I also received this morning from Intervenor, EDS, a Motion to Dismiss untimely allegations, contained in Protester's complaints. I have considered the Motion. I have decided to deny it, on the basis that it was filed out of time. I have prepared a response to it, a brief response to it, with an accompanying letter, which I will ask my legal assistant to give to each of you.

MR. SHLAKMAN: Your Honor, while this is being distributed, I have been advised on that prior subject that there are two print orders not currently filled, with a total value of approximately $10,000. It is those two print orders that I request EDS be permitted to fill, that they be exempted, as it were, from the suspension in order that the Government can get value for the effort that has already taken place.

It is just not like a line that I can turn off and then some day turn it back on.

JUDGE LaBELLA: Was that $10,000 each?

MR. SHLAKMAN: No, sir; in the aggregate.

JUDGE LaBELLA: What is GPO's position?

MR. GREENBERGER: Your Honor, GPO has no position on this one way or the other.

JUDGE LaBELLA: Mr. Gorman?

MR. GORMAN: We would like to get our printing out, of course, that's the Army's position.

JUDGE LaBELLA: The Army's position is you want that printing order fulfilled by this contractor? Is that your position?

MR. GORMAN: If this contractor has already incurred costs that the Army will have to reimburse through GPO any way, yes, of course we would. We also have a position that the printing that is done under this contract is less than the printing that we could get done under the standard GPO contract. It would be our position that the contractor should be able to continue those that are in the pipeline, if he has already incurred costs on them.

JUDGE LaBELLA: Does anybody else have anything to say about this before we close the matter?

MR. WILLIAMSON: Your Honor, again, it seems to me we are talking about facts that we don't have. It is hard for us to speculate. I would observe that it seems to me that when GPO decided to go ahead with this contract, they were running the risk that something like this might happen.

JUDGE LaBELLA: Mr. Goldbloom?

MR. GOLDBLOOM: I have to agree. The issue of that risk was aired, I believe, at the last conference before Your Honor, and acknowledged by GPO and the parties. Again, I am not trying to address the facts which I don't know and which it appears to be apparent from counsel that they are just learning them momentarily. It is very hard to deal with.

MR. SHNITZER: Your Honor, I think it is rather inconsistent with the normal approach taken by this Board, to decide those things which are in the works can be completed, notwithstanding the suspension. It seems to me the whole idea of the suspension is to protect the interests of those parties who are the Protesters. I don't think that is effected by permitting the print orders to run their course.

JUDGE LaBELLA: Thank you. I have already ruled that all such orders are to be suspended. If there is any change in that, as I have a chance to think about it before my written Suspension Order, it will be in the written Suspension Order. For the time being, I am sticking with the ruling I have already made.

The second reason we are here today is to schedule further proceedings in this matter. We are already significantly out of time in the proceedings, due to the nature of this. I think it is all for the best anyway, nevertheless. Keeping that in mind, I would like to go ahead and schedule certain aspects of the proceeding at this time, as realistically as we can.

It is my understanding that all three parties, protesting parties, and perhaps the GSA as well, would request discovery.

MR. GOLDBLOOM: That's correct, Your Honor.

MR. WILLIAMSON: Your Honor, could I make one observation about that? I have a little conceptual problem at this point about where we are in this case. It seems to me we take one more step and if it is found that ADP equipment is involved in this procurement, then the procurement is clearly subject to the Brooks Act. It seems to me a Motion for Summary Judgment to declare the procurement void, reward being made without legal authority, would be in order.

I would say that any discovery we have at this point should be just directed to the ADP question. I can't see either way, the Board getting to the merits here. If it has jurisdiction, it seems to me the award is void. If it doesn't have jurisdiction, because no ADP is involved here, then it seems to me that for that reason, we don't go to the merits, at least with this Board.

JUDGE LaBELLA: Assuming there is ADP involved here, it is conceivable that the GSA may wish, nevertheless, to delegate authority and to essentially ratify what may be described, for lack of better words, as the ultravirus, should we conclude the GPO procured without authority, the ultravirus actions of GPO in that regard. It is conceivable that GSA might take that position. If it does, then we are in a situation where the lack of a DPA would simply go to really the remedy here. That would have to be taken into consideration as one factor, along with an analysis and how we come out on the merits of the basic protest matters.

It may well be that GSA may want to take a look at those as well, before they decide what action to take. At some time, I am going to put the finger on GSA, to come up with their position on the entire matter.

I view it as broader than you do. It is conceivable that it is simply voidable rather than void, even if we should conclude that it was an ultravirus act.

MR. WILLIAMSON: My point was that perhaps we could save some time and effort by deciding that issue and getting that out of the way before we launch into discovery on the merits. I understand that time is becoming critical here.

JUDGE LaBELLA: Yes, unfortunately, as you know, we are in this so-called fast track procedure here. I think we have delayed it long enough. Unless I hear some good reason to do otherwise, my intention is to go forward with the whole ball of wax at this point.

Does anybody care to comment on that?

MR. GREENBERGER: Just to say that I agree. I think that you are absolutely right about the status. I would say from GPO's part that we are anxious, if we are going to be here to show that the allegations were improper, then we are anxious -- it is in our interest, I think, for purposes of the integrity of the Agency, to do so. We agree that we should have discovery on all these things. I think, in fact, if it is shown that there was no wrongdoing on the part of GPO, and if it is shown that it is ADP, which we will continue to protect, that may very well influence this Board on what the remedy should be.

MR. HOLMES: I believe it's time to go forward and get everything done.

JUDGE LaBELLA: That is the feeling of the Board, that we should go forward with all aspects of this case. So I need to have or to get a feel from each of you as to precisely what sort of discovery you have in mind, and perhaps we ought to start with Xerox.

MR. HOLMES: Could I hand out a proposed schedule that I have made up, Your Honor?

JUDGE LaBELLA: You can show me one.

[Laughter.]

JUDGE LaBELLA: Why don't you all take a minute to consider it.

[Pause.]

JUDGE LaBELLA: Back on the record.

Have you all had a chance to look at this?

MR. GOLDBLOOM: Yes, Your Honor, and I believe the Protesters have attempted to caucus among themselves here -- except for the GSA.

JUDGE LaBELLA: I guess they are more closely aligned with you than they are with --

MR. GOLDBLOOM: If I could put them in league with the Protesters, if we could have another minute.

JUDGE LaBELLA: Sure.

[Pause.]

JUDGE LaBELLA: Back on the record.

MR. GOLDBLOOM: If I might attempt to speak for our group, and I'm sure counsel will correct me if I am misstating our understanding, what we would propose -- I think this is a good stab at a schedule, and I think with some minor adjustments, we might be --

JUDGE LaBELLA: I would agree with you. In fact, I had some tentative dates penciled in here, and they are not very far off. So we are in the same ballpark.

MR. GOLDBLOOM: Your Honor, our proposal would be, to start on the second line, that all written discovery should be moved from the 10th to the 12th. It would give us time to be able to do that, and I assume that among ourselves we might even be able to pare it down and deal with it in a more streamlined fashion.

Answers to written discovery could be moved from the 14th to the 18th, and I am told by counsel for GSA that the 17th is a Federal holiday.

We believe that one week for depositions would not be sufficient given the range of the issues posed and we would propose that there be two weeks for depositions, which would require a moving of the hearing from the 3rd of March until the 10th of March, and that way the depositions could take place during the weeks of the 16th and the 23rd and final preparations for the hearing during that last week, and we

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could perhaps iron out any discovery issues that might arise.

This schedule here does not encompass the obvious issue which arises in many of these cases about discovery disputes, which I assume there may be some.

We would also propose, to facilitate the proceedings, that a protective order be issued which would limit the disclosure of the materials to be submitted to the outside counsel to the Protesters, plus inside counsel, but not to businessmen or any other personnel representing the Protesters. We would be agreeable to that.

JUDGE LaBELLA: The materials that you are referring to would be -- what sort of materials are you talking about now?

MR. GOLDBLOOM: Materials from the proposals.

MR. GOLDBERGER: Your Honor, in that regard I am told that there is a considerable amount of proprietary information within the file, and it may not just be the Protester's proprietary information but it may be information that was licensed to them of subcontractors or something else, and if the Protesters have concerns about proprietary information, they had best have them put on the record because they are here with this Protest and we will put forward whatever they agree to put forward, but if they want to be protected, they should say so now.

MR. HOLMES: Your Honor, could I speak in support of this schedule, seeing as how I wrote it the first time up? I think that what the Protesters are proposing is too leisurely a schedule, and if I understand when the cut-off date is for the Board to issue its decision, I think the schedule is basically backing the Board into a hole in terms of dealing with the issues and resolving them and having an adequate amount of time to do that.

You know, we are dealing with three or four focused issues that are exposed in the pleadings, and I can't believe and I certainly do not hope that the Board is going to let everybody go off and conduct gigantic fishing expeditions. The parties have focused their issues in the pleadings, the Board had recorded those issues in its decision that it issued on the jurisdictional matters, and, you know, it is time for people to get down and do their work.

The other thing is you have got three or four large law firms around here or large government agencies that have a large amount of resources, and this schedule is specified by Congress and is endorsed in the Board's rules, that fast track schedule, and I think it's time for people to get to work and get it done.

JUDGE LaBELLA: I would agree with you, Mr. Holmes, in principle.

[Laughter.]

Speaking realistically, I'm not so sure. But we do have, as you know, the release valve built into the statute, and I believe this is an appropriate case for that, particularly in view of the proceedings that have already taken place and the delay that has ensued as a result of those proceedings and, I might add, at your request as well as GPO's request.

It is unusual, and in fact it's the first time that I know of where the Board has done that, and I don't expect it to happen very often, frankly, but it did in this case and we dealt with it. We acted with restraint, and now we are confronted with an extremely tight schedule. But I do feel that we need to have full discovery in this case, with the nature of the allegations that have been made. I think it is appropriate, provided that the parties want it, and I understand they do.

I will permit a reasonable time for discovery to take place, and I don't think we are all that much off in this agreement, really. It's a matter of a week. I came out having the hearing, frankly, before talking to you, on the 5th of March, you are proposing the 3rd, and the Protesters are proposing the 10th. So somewhere --

MR. PECKINPAUGH: Your Honor, if I may, I would suggest -- I think there was one element that was left out, and that is the filing of the notices of the depositions, and I would contend that we should have a couple of days in which to look at, analyze the answers to the written discovery before we know precisely who we would wish to depose. So that I would --

MR. HOLMES: You have got a couple of days, the 15th and the 16th. This is a fast-track proceedings.

MR. GOLDBERGER: Actually the 17th, too, because that is a holiday.

JUDGE LaBELLA: Well, it is not unusual that you would start your deposition taking before you have answers to interrogatories in these proceedings. That has not been unusual, unfortunately, but that is the way it has been working.

MR. PECKINPAUGH: Well, in that case, I would at least suggest that the period for noticing the depositions not close until after we have had a couple of days to look at the interrogatories, which I believe by the schedule that was proposed, the answers are due on the 18th, so that the close of the period for noticing depositions would be the 20th.

MR. SHLAKMAN: Your Honor, from my perspective, the central issue is --

JUDGE LaBELLA: Please speak up.

MR. SHLAKMAN: I'm sorry. From my perspective, Your Honor, the central issue is not when the depositions necessarily will fall in terms of a quibble over five days, seven days or ten days but are we going to have some reasonable restraint on the number of depositions that can be taken during whatever period the Court should determine is appropriate for the taking of depositions?

The Protesters have filed their issues, and I would hate to see this degenerate because I have been involved in proceedings where if you have ten days, they will find that many more people to depose just to expand it to fill the available time.

JUDGE LaBELLA: Well, as you know, or maybe do not know, our Rule 15 provides for that. You may petition the Court for relief if you feel that you are being harrassed or if you feel that the parties have gone beyond what we have contemplated here.

MR. SHLAKMAN: In a fast-track process, it would be my fond hope that neither of us has to bother the Board over being harrassed by the other during the course of discovery. One way to avoid that from intefering with our schedule would be to have some reasonable limit on the number of depositions that can be taken, whether it is five or whether it is seven or whether it is five plus the contracting officer. It doesn't matter to me. But if we could arrive at a limitation on how many people would be deposed, we focus ourselves on who is relevant to the issues that have been raised, with perhaps an escape valve of one or two if something new comes up in the interrogatory answers.

JUDGE LaBELLA: Well, I think the best way to handle it is to see what develops, and if what develops is not agreeable to you, you are free to promptly come in under our Rule 15 and make that known to the Board.

MR. MOORE: Your Honor, perhaps a modification. I was wondering, with respect to the notices of deposition, if we could ask that those would specify the particular issues in the pleadings that a witness is being deposed to discuss so that we would have a guideline going in about whether these are going to the heart of the matter or going to be a fishing expedition.

JUDGE LaBELLA: Does anyone have any problems with that?

MR. MOORE: I think that's an excellent idea.

MR. GOLDBLOOM: Well, my understanding is that when you are doing discovery in the course of a deposition you could find out from a witness that he has knowledge about subject matter that you had no idea that he was involved in, and it would be pretty hard for me, unless - I mean the incentive would be to put all my issues in for every witness because I'm not sure which ones know about them.

But I don't want to go beyond the spirit of it. I think it's a good idea but I don't think it is very easily put into practice. I think the short answer is that if witnesses are being harrassed, if discovery is being abused, this Board is very well capable of dealing with that and would when a party would bring the matter to its attention in the protective order.

MR. MOORE: Your Honor, I think that is a pretty hypothetical objection. I mean we do have these issues laid out clearly in the proceedings, and the notice shouldn't just say every issue in the pleadings. We know what people are involved in making evaluations and who the contracting officer is and so forth. I don't see why a notice of deposition cannot direct the people responding to the deposition for purposes of preparing the witness and so forth on specific issues.

JUDGE LaBELLA: Mr. Shnitzer.

MR. SHNITZER: Your Honor, there is one point here that I think merits making, and that is that although it's true that each one of the Protesters had been specific with respect to issues, I don't think the Board should take the position that this necessarily represents the totality of all the issues that are available. To my knowledge, nobody has had the opportunity for debriefing, and I don't know that anybody has had other than very miniscule or minimum amounts of records made available to them.

So it seems to me not unlikely that, in fact, in the course of depositions -- and I think this is a legitimate purpose for depositions -- that additional issues will arise, and I don't think the Protesters should be foreclosed from those additional issues.

MR. WILLIAMSON: We agree with that, Your Honor.

MR. GOLDBERGER: Your Honor, I would say that I think that to go into this with the open idea that this discovery -- I think in Federal District Court or anywhere -- that we are going to have a fishing expedition is not appropriate. It seems to me that the issues have been framed. If the parties think that they need to amend their protest based on something, they can amend their protest and we will start discovery again. You have already said the 45-day period can be extended, but this is a very fast-track schedule.

One thing I do want to say is that GPO has limited resources for dealing with discovery, and we cannot be put in a position of dealing with three different law firms and their creativity, attempting to find and turn and twist. If the Protester amended, then discovery can be expanded, but we would like to focus the Protest.

You listed in your opinion what on their face seem to be serious allegations. We are fully prepared to meet those allegations and to do what we need to do if we are going to be in this proceeding, but it bothers me to think that the depositions or any other part would be used hoping to turn something else up without amending protests and dealing with it then.

JUDGE LaBELLA: Mr. Gorman.

MR. GORMAN: Your Honor, I just wanted to give you an idea of the numbers of people that could be involved here. We have over 20 evaluators on this contract. Certainly there could be a deposition of each one on every one of these issues and it would fit within the broad scope of the Board's rules as far as leading to admissible evidence.

Also, you have five or six others who are really the ones that were involved in the final decision that was made here, and those five, or rather six seem to me to be the ones that are most relevant to what happened in this case. If we go into the other 22 evaluators plus, perhaps, other folks who were consulted on an ad hoc basis, we are opening this thing up to an awful lot of depositions which are probably -- well, except for a fishing expedition, are going to serve no purpose.

JUDGE LaBELLA: Well, I am more concerned about the fact that we have three or four parties in opposition to GPO, and it would seem to me that we have to work something out there.

MR. GOLDBLOOM: I can address that, Your Honor. We have already conferred and agreed to coordinate our discovery among ourselves so that there will be no duplication or replication and no effort will be made to harrass the parties. I think we all have a diligent effort to determine the facts and cooperate with the rest of the parties.

JUDGE LaBELLA: Very good.

What about GSA?

MS. STEVENS: We have agreed to cooperate. We certainly would not want to duplicate anything.

Our question is limited, and I think the question is clearly in the record. We remain interested in the question of whether this is ADP, whether this is ADP in accordance with the Brooks Act, and one of my concerns would be we probably would want to talk to Mr. Gorman's 20 people, not for long but in terms of finding out what their background was and what their situations were in this procurement.

I don't know that anybody else would want that. Everybody else will have to make their own decision.

MR. HOLMES: Your Honor, I hear a lot of competent counsel sitting around here from big law firms starting out like they are going to try a three year District Court case, talking about numerous depositions and that type of thing.

JUDGE LaBELLA: We haven't talked about numbers yet.

MR. HOLMES: I have heard 20 and 30.

JUDGE LaBELLA: He is a guy from the Army.

MR. HOLMES: He is co-counsel and he doesn't count any more.

[Laughter.]

MR. HOLMES: It is not unusual at all, even in District Court cases today, for the District Judge to sit and establish budgets and establish time tables when those depositions will be conducted. I think that is even more necessary for the Board, to give us some guidance, in light of that 45 day timeframe, even with a safety valve on it.

MR. WILLIAMSON: Just one other thing, Your Honor, that you might put in your mind. We asked for a De-Briefing on this, on the 9th or 10th of January, and have not even received an acknowledgement, although we have identified some issues, it certainly doesn't seem fair, without a De-Briefing particularly, to limit us to those issues.

JUDGE LaBELLA: What is the GPO's position about the De-Briefing?

MR. GREENBERGER: The GPO's position about the

De-Briefing is twofold, Your Honor. On is that the GPO doesn't have rules that provide for a De-Briefing. They provide for notice to the parties. The GPO is prepared to give notice to the parties. The second point is -- I would like to talk to Mr. Moy about it. We are prepared, I think, to give a fuller De-Briefing. The problem is we have been heavily involved in dealing with this Board, and secondly, Mr. Moy discovered that one of the Protesters had scheduled a De-Briefing without the General Counsel's Office or anybody else knowing about it. Not that we want to avoid the De-Briefing, but it just makes common sense when you are in the middle of litigation to at least see what your people are going to say ahead of time.

If somehow the De-Briefing plays an important role in this, I think the GPO will provide --

MR. MOY: We can provide -- the printing procurement regulations provide that, Your Honor.

MR. GREENBERGER: Your Honor, I would certainly say that the Protest evidenced the fact that -- knowledge has been gained. They have pinpointed their objections. I think if we do allow efficient expedition on this, it is going to strain the resources of the GPO.

JUDGE LaBELLA: We do have a problem here. It has come up in many protests. I can recall several involving the Army where a protester comes in and says, I have issues, one, two and three, because the Army tells me I have been rejected for this and that reason. Come the Pre-Hearing Conference, I hear from the Army they have 20 reasons for rejecting them. The protester than finds 20 more reasons to object to that. The whole thing just blossoms.

It does seem to me that it is advisable to get that all out in the open as soon as possible. I would suggest perhaps a De-Briefing as a good way to do it.

MR. GREENBERGER: Let me ask you this, Your Honor. My understanding is that the Protest File will in effect serve that purpose. A Protest File is usually not handed out in a De-Briefing. As you know, I have been through De-Briefings before. In a normal De-Briefing, you do not learn what would be in the Protest File. De-Briefings are shaped -- sometimes you have to write out your questions. You can't speak orally. The Protest File will be there.

My view is if the Protest File evidences something, that the Protest should be amended. We have to give our reasons and explanations in the Protest File.

JUDGE LaBELLA: I am certainly not going to limit the Protesters' right to amend their Protests based on the Protest File, if during discovery they discover something that is pertinent.

MR. GREENBERGER: Your Honor, I think we should get it out and be clear about it. There are two approaches here.

There is one to limit it to what the Protests are, and there is another to say there could be a million reasons out there, so therefore, the Protesters should be able to discover every one of those reasons. I think we have to somewhere decide where we are going to be.

My own personal view and fear is that I think these three law firms, whatever offer they make of coordination, can dump an awful lot of stuff on us, hoping to find some additional reason. If you are going to permit that, we will have to live with that.

I would hope that we have bright lawyers here who have crafted protests, they have pinpointed their allegations. It seems to me that during the course of discovery, something else comes up, they could amend their Protests and we could go on. Otherwise, if the way it is going to be run is that they should just have any discovery they want, to come up with any conceivable protests, I think we would like to know that from the outset.

JUDGE LaBELLA: I am certainly not going to permit a fishing expedition. I don't think counsel here are asking for that, or even have that in mind. They are handicapped somewhat because they have not had a De-Briefing. I understand their point of view expressed here, that they are not willing to say they are not going to amend their Protests, or in what respects they are going to amend their Protests, until they find out why they have been rejected.

MR. GREENBERGER: Can we reach a ground here that goes between a fishing expedition and the Protests themselves? That is what I am looking for, that boundary.

MR. SHLAKMAN: He just said he was not going to permit a fishing expedition. I have the hearing date set as the 5th of March, Your Honor. Can I hear the rest of the schedule?

JUDGE LaBELLA: I'm not so sure that the 5th of March is the date we are setting at this point. In any event, what I would suggest is that I think we have enough of a commitment from counsel here, that they would act in concert. I find that admirable. I would expect you to do that. It would certainly streamline the process considerably.

I understand GSA's point of view. You have special concerns apart from the Protesters. I think that needs to be respected as well. I don't understand why three agencies of the Government could not cooperate among themselves without the use of discovery. I would expect that to happen.

MR. GREENBERGER: That is fine. Is that what we are really talking about, cooperation among ourselves? If that is what we are talking about, that is fine. I understood it to be something other than just casual conversation back and forth. Did I misread the GSA in that regard?

MS. STEVENS: I am sorry. I don't understand.

MR. GREENBERGER: Are you saying you want formal contacts with the technical evaluators?

MS. STEVENS: We think we are going to need formal discovery.

MR. GREENBERGER: That is my point.

MS. STEVENS: We would be willing to start out trying informal --

JUDGE LaBELLA: That is all I am suggesting, that it would seem to me that Government agencies can cooperate with each other, even though they may have different interests sometimes. If that is not possible, it seems to be the case so far, then I would allow GSA to discover.

MR. GREENBERGER: Your Honor, in terms of saying it doesn't seem to be the case so far, we have had no discussions about this. We, of course, will accommodate GSA in that regard in any way we can. Likewise, GPO has an interest in talking to GPA's technical evaluators that led them to reach the result they reached last Friday.

JUDGE LaBELLA: I think you talked them out of it.

MR. HOLMES: Your Honor, could I raise one special concern that we have? That is, having won this contract, we believe fair and square, by being high technically and low cost-wise, we have some very real concerns about our proprietary information that is in that proposal, particularly the cost information.

I am hopeful that we are going to win this Protest, but let's all be realistic. There are some chances that there might be another go around on this bid, and it is really grossly unfair, if that kind of information is distributed around in any fashion that could allow people to take advantage of that and have an option the second time around.

JUDGE LaBELLA: Mr. Holmes, what you are suggesting is something that Mr. Goldbloom brought up.

MR. HOLMES: His suggestion was outside counsel and inside counsal for the companies have access to that data. I do not agree with that.

JUDGE LaBELLA: What is your suggestion?

MR. HOLMES: Outside counsel, and that there be signed agreements and policing of where that data is in people's offices at various times. Frankly, Your Honor, I have had bad experiences with that myself in the past.

MR. WILLIAMSON: Your Honor, we feel very strongly that inside counsel should be recognized as the equivalent to outside counsel, for the purpose of looking at this data.

MR. HOLMES: I don't think that is fair or reasonable, Your Honor. I would say also Judge Lieblich --

JUDGE LaBELLA: In the past, the Board has pretty much limited it to outside counsel. I am willing to listen to further discussion and anything further you have to offer as to why that would be necessary or why you feel it is necessary to have inside counsel or outside counsel privy to this information, particularly the information having to do with what is proprietary to another firm. I am not as much concerned with information that may be in terms of the procurement, the Government's records, that would have some sort of procurement proprietary legends on them. Not "proprietary." I am searching for the word.

MR. HOLMES: Evaluating data.

JUDGE LaBELLA: Yes, the Government's evaluations and things of that sort. They are basically Government documents.

MR. WILLIAMSON: We feel very strongly that our particular inside counsel want to take an active part in this case and has contributed --

MR. HOLMES: That is exactly why I objected.

JUDGE LaBELLA: Mr. Holmes, you have made your point three times now and I would like to hear from Mr. Williamson.

MR. WILLIAMSON: We would be willing to -- in fact, very happy to keep the documents in our offices here in Washington. He is up in New York, and have him come down here and look at them here in Washington and not move them.

MR. HOLMES: And go back to New York.

JUDGE LaBELLA: You need to tell me why you need his participation in this case.

MR. WILLIAMSON: I just have to limit myself to saying he feels very strongly about it and wants to be a part of it.

JUDGE LaBELLA: Does anyone else have the same problem as Mr. Williamson?

MR. SHNITZER: Your Honor, we have Mr. Peters here, directly behind me. He participated actively. We have from the beginning listed him as our counsel in this proceeding. It has always been contemplated that he would take an active role. It doesn't seem to be fair to simply cut him off.

MR. SHLAKMAN: Your Honor, we need these people, not only in this procurement --

JUDGE LaBELLA: Just a second. You will have your opportunity to response. I want to hear if Mr. Goldbloom has any problems.

MR. GOLDBLOOM: I don't have a particular problem. I subscribe to the views that the co-Protesters have stated. I don't have anything specific to add.

MR. SHLAKMAN: I would only add, Your Honor, that we meet the same competitors not only in this procurement, if it should come again, but we meet them on the field of competitive procurement in deal after deal, day after day. As an inside counsel, I can tell you that my prurient interest in the way they cost is very hot. I am perfectly prepared to subrogate that, so they do not find out or satisfy their prurient interests in how I cost.

The precedent of this Board has limited it to outside counsel. I can tell you as an inside counsel, I have great concern over it. I know the questions that inside counsel get asked every day by marketeers. I have great concern of inside counsel having access to this information. They can participate in a very meaningful way without looking at my cost numbers.

JUDGE LaBELLA: Right, no doubt there is great interest there. Frankly, I think it is simply a dilemma and there is no real good solution to it. My position is after hearing you, that I see no strong reason why inside counsel must be made privy to the information. I would prefer to proceed on the basis of limiting the information to outside counsel, because of the built in conflicts here. I would rather avoid that if we can. I think we can. I don't have any reason to question the competence of anyone here.

MR. MOORE: Your Honor, GPO has no interest in this particular dispute, but it is down on this chart as submitting or getting the File, by this Friday, which is a very short --

JUDGE LaBELLA: Which is exactly the same day I have in mind.

[Laughter.]

MR. MOORE: I wasn't even going to speak to that, believe it or not, Your Honor. We can't possibly sort out all the questions of confidentiality between now and Friday. My proposal would be that we put the File in In Camera and circulate indexes of what is in the File In Camera, and let these parties, who are very capable of sorting it out themselves, determine which ones are confidential and so forth.

JUDGE LaBELLA: If we were to agree here, and I think I just ruled, that a Protective Order would be appropriate here, I see no reason why you could not simply distribute the File, subject to such a Protective Order.

MR. MOORE: That is going to cover all documents in the File? No documents go to inside counsel?

JUDGE LaBELLA: I see what you are saying.

MR. MOORE: We cannot pick and choose between documents.

JUDGE LaBELLA: For the time being, it will be subject to a Protective Order for all documents. When can you ascertain which documents, by Monday?

MR. MOORE: That is going to depend on when -- the Protesters will have to tell us which documents they consider to be confidential. That is to be sorted out, I would say by Your Honor and Protesters and EDS. It is not our dispute. They are all in this proceeding, able to protect their own interests.

JUDGE LaBELLA: Are you telling me the documents are not marked proprietary?

MR. MOORE: Some of them are marked proprietary. Many of them are. We want to make sure we are not giving out any documents that someone has not validly marked, if that is the concern. If not, we will go through and give the ones that are marked and not the others.

What I am suggesting is if anyone here has a problem with that, they had better raise it, or else we are going down that road.

MR. GORMAN: Your Honor, there could be many documents that are marked that are really not proprietary. It depends on the policies of the particular company. It is hard, in the FOIA area, particularly, it is hard for the Government to sort those things out without asking for direct input from the submitter of the information.

JUDGE LaBELLA: I certainly think the Government would have to respect any legend, unless you feel otherwise, and then you can bring it up with the Board, whether it is or isn't, if it becomes relevant. I don't see that problem, really.

MR. MOORE: We are authorized to go solely by the legend and everything in the legend that is proprietary will be submitted pursuant to the Court's Order. Should we submit those documents to the Court or directly to outside counsel for the parties?

JUDGE LaBELLA: You may submit them to outside counsel, subject to the Protective Order. You need to clearly identify the items that are being so admitted.

MR. MOORE: I understand.

JUDGE LaBELLA: The practice has been to submit to the Board what we call a sanitized version, a set for the public file. You would be amazed. People come in here and read these files. I don't know why, but they do.

In any event, we need to have a public file that is sanitized, and then the full file, which would include the In Camera documents. You should indicate which of those documents in that full file are being submitted In Camera by an appropriate stamp, index or whatever.

MR. GOLDBLOOM: Your Honor, picking up on Counsel for GPO's question, would it be possible to allow the Protesters, as well as any of the parties that may have submitted proprietary and commercial information that they do not wish to disclose outside the protective order, a period of time after the filing of the file to the Counsel -- say, two or three days -- an opportunity to indicate which portions of the file they consider to be proprietary, so that it could be then released to the public file and then generally distributed among the parties and their respective personnel.

JUDGE LaBELLA: Do you have anything to say about that? Does that sound workable?

MR. HOLMES: I think that is a good second step, to make sure that we have got everything out of there.

JUDGE LaBELLA: Well, okay. Then let's start here on scheduling things. Let's have the Protest File on Friday, the 7th, and I will allow until the 11th for any such problems to be resolved to be brought up.

MR. WILLIAMSON: Well, Your Honor, Mr. Goldbloom also did not mention that I think we would object to any more dispositive motions at this point, as Mr. Holmes has allowed for them in his schedule on Friday.

JUDGE LaBELLA: I hadn't noticed that. What date does he have that on?

MR. WILLIAMSON: The 7th.

JUDGE LaBELLA: Oh, I see. Well, he did have to take care of this timeliness motion.

[Laughter.]

MR. HOLMES: I keep trying, Your Honor.

JUDGE LaBELLA: I have already ruled in the decision that you see there that the time has passed. So you are quite right, Mr. Williamson. And GPO's answer will be due on Friday as well.

Just so that there is no question or no doubt here, the Protest File will include -- that is given to the parties, will include -- it will be an unsanitized version.

MR. GREENBERGER: Mr. Moore is going to take charge of that, and we are a little confused about it.

JUDGE LaBELLA: All right. I just want to make it perfectly clear.

MR. MOORE: I was just going to raise that with you.

JUDGE LaBELLA: You are to provide the Protest File to the outside Counsel only, and for two days, that file is not going to be given to anyone except outside Counsel and the Board.

By the 11th, if there is any problem with any of the documents that the Government has marked for release generally, you are to bring that to GPO's attention and to the Board's attention by, let's say, noon on the 11th of February.

MR. MOORE: Your Honor, just to get my marching orders exactly precise, should I give each outside Counsel two files, one with documents marked "Proprietary," one with documents not marked "Proprietary," and then it is my understanding that they will have until the 11th --

JUDGE LaBELLA: No. That is just for the Board. Let Counsel handle their own duplication of non-proprietary materials themselves. I think they can do that. Unless you want to do that; I mean, you are free to do it.

MR. MOORE: No. I'm just talking about taking the complete file and bifurcating it for each of the Counsel into two files. It would not be like the Board's file. I understand what the Board's file is to look like. But I'm saying, give each Counsel one file with documents labeled as protected, and the other one as not.

And it's my understanding that with respect to documents that have not been labeled "Protected," they would then have until February 11th to object that some of those documents should also be held in confidence.

Is that my understanding?

JUDGE LaBELLA: Is that a good way to go, as far as you all are concerned?

MR. GOLDBLOOM: Did I understand you to say, sir, that you would make a preselection of proprietary information, and then we would add to it, or there would be no preselection, and then we would notify you by the 11th as to

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what is to be --

JUDGE LaBELLA: No. There would be a preselection, and he would simply separate them into two different volumes, right?

MR. GREENBERGER: I think it may be easier for us, if it's all right with you, to do it so that there is no preselection, and let everybody tell us what they want to be proprietary.

MR. SHLAKMAN: That's right. They are setting up such a cumbersome structure. If you will turn the entire file over to outside Counsel with an index, we will tell you by the 11th that which is proprietary.

JUDGE LaBELLA: If everyone agrees to that, that's fine with the Board.

MR. GOLDBLOOM: That's fine. And may I make one --

JUDGE LaBELLA: Okay, fine. We will proceed on that basis, by noon on the 11th.

MR. GOLDBLOOM: May I make one point of clarification, and that is, as I understand it, outside Counsel are not to show the contents of this file to anyone else.

Would it be appropriate to exempt any materials submitted by Counsel's own client to some representative of Counsel in order to make the determination as to what might be proprietary; in other words, nothing from any other

Protester or any other material other than that which emanated from you?

JUDGE LaBELLA: Certainly.

MS. STEVENS: Your Honor, everybody is to let GPO know by noon on Tuesday, the 11th, what is proprietary. Will GPO then put out a document that indicates on the index or some other way, so that everybody will know what GPO has been told?

We have got information --

JUDGE LaBELLA: You are going to be served with all of this information, I would assume. The index, Counsel will simply serve on GPO and to all the other parties an index of which documents, so that you'll know which documents are considered to be proprietary by that party. You will have a copy of that.

MS. STEVENS: So after noon on the 11th, GPO will put out an index that indicates that to me? After everybody has told GPO --

JUDGE LaBELLA: EAch party will essentially formulate their own index of proprietary data that is in that file, and you would -- I would expect you to list it by Exhibit Number. The Rule 4 File and how it is to be prepared is provided in our Rule 4, and I would expect the GPO to follow those rules, and all that the parties will be expected to do is to identify which exhibits and which pages of those exhibits are considered to be proprietary, and those will be then considered to be in camera.

MS. STEVENS: And the GPO will let everybody know what they have been told?

MR. SHLAKMAN: Each party will tell every other party.

MS. STEVENS: That's what I was trying to clear up. That's what I needed.

JUDGE LaBELLA: You will be served by Counsel for each part with their list of documents.

MS. STEVENS: All right.

MR. GORMAN: Your Honor, there is one issue we haven't touched, and that is the evaluation documents. The extent that that may -- the release of that to other than outside Counsel may impact the procurement if we have to go back for another best-and-final.

JUDGE LaBELLA: Right. I would include those documents among the documents that outside Counsel would be reviewing, and if they feel that they reveal information that is proprietary, then they would say so, and then the Board will deal with it.

MR. GORMAN: The information -- we're going to, if we let the parties review their own evaluation documents, they're going to know what their strengths and weaknesses are, and we're going to have a leveling of proposals. It seems that the --

JUDGE LaBELLA: Well, you are arguing now -- your argument comes too late. We have decided that outside Counsel -- and that is the reason for outside Counsel to be involved here -- and limiting -- the protective order will limit the release of this information to outside Counsel.

MR. GORMAN: Yes. But Mr. Goldbloom said that that didn't apply to those documents that relate specifically to his own client. What I'm saying is that the evaluation documents for Xerox --

MR. SHLAKMAN: No. He said those documents generated by his own clients.

MR. GORMAN: All right. So the evaluation documents are protected to outside Counsel only.

JUDGE LaBELLA: That's right. That's all. And that will be covered in my protective order, which I hope to issue tomorrow.

Okay, let's move on. We have the Protest File. We have the answer, and we have the noon deadline on the 11th.

MR. MOORE: Your Honor, with respect to the answer, because we are going to be putting together this Protest File, could we have until Monday on the answer?

JUDGE LaBELLA: Well, you are going to nickel and dime me to death here, and we are going to end up expanding this thing beyond, way beyond the scope that I have in mind.

MR. MOORE: Your Honor, though, --

JUDGE LaBELLA: I think the parties need to have the time -- let me finish -- the time to see what your answer is going to be, to be able to serve their written discoveries and prepare themselves for all that.

MR. GREENBERGER: Well, the only thing we were thinking was, Your Honor, that if they have to wait until the 11th anyway to look through the Protest File, if the answer is served on the 10th, they're still going to have the same amount of time they would have had anyway.

JUDGE LaBELLA: No. Counsel is going to have the Protest File on the 7th.

MR. GREENBERGER: But nothing is going to happen, I thought, until after they had made a determination --

JUDGE LaBELLA: No release of the file until after.

MR. GREENBERGER: Oh, okay.

JUDGE LaBELLA: That doesn't mean that the gears can't start to grind. They should be grinding already, and I'm sure they are.

Okay. No, I'm going to stick with the answer on the 7th and the Protest File on the 7th, and it's understood, then, that the parties will advise the Board as well which documents within that file -- and this goes for GPO -- which documents in that file are considered to be proprietary or not releaseable or releaseable subject to the protective order, such as the evaluation documents and all that.

MR. GREENBERGER: Your Honor, Mr. Moy asked me to clarify. I take it, the problem with outside Counsel/inside Counsel would not apply to GPO because they have access to these documents anyway.

JUDGE LaBELLA: That's right.

So we moved over the written discovery until -- service of written discovery until the 12th, and objections to written discovery, I would want them by the 13th, and any hearing on it or any responses, written responses to such objections by the 14th. Answers to written discovery requests by the 18th.

MS. MADSEN: Your Honor, I have a question about answers to written discovery. I want to be sure that those will be answers and not further objections.

JUDGE LaBELLA: Right. If there are objections, the answers are to be provided in any event to the Board. And if for some reason or other, we cannot resolve the objections, at least the answers will have been prepared, if there are objections pending. I expect that the objections will be dealt with speedily.

Depositions, I would like to see the close of any deposition-taking by the 28th of February. I'm sorry. Move that back a day to the 27th. And requests for admissions by the 28th.

Unless otherwise indicated, it is all close of business, which is 4:30.

Answers to Requests for Admissions and Stipulations on the 3rd of March. I would begin the hearing on the 6th of March. Briefs by the 4th of March, along with exhibits and your final witness lists by the 4th of March. Tentative witness lists moved back to the 28th.

Have I missed anything?

MS. MADSEN: Your Honor, I'm sorry. Do you want prehearing briefs on the 4th?

JUDGE LaBELLA: Right.

MR. SHLAKMAN: Your Honor, you asked whether you missed anything, and I don't think you did except the answer to the question that I'm going to get asked as soon as I get back to my office, which is I used to be able to predict when the final date for the decision had to be until you said that you thought this might be an appropriate case for the relief valve.

Do you have an anticipation as to what the decision date will be now that we have been suspended? It seems to me on the schedule --

JUDGE LaBELLA: The decision date would have been the 24th of March. We seem to be extending this approximately two weeks. I don't want to commit the Board to anything at this point. It's very difficult to tell. But I can tell you this, that we will make every effort to live with the original 45 days if we can. I don't think it's going to be too

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likely.

It seems to me at most it would be a two-week extension, but I will let the Chairman decide that. It is his decision to make as to how much of an extension to give. I have talked to him briefly about this problem, and he indicated to me that he thought it was an appropriate case given what has already transpired and the number of parties involved and the issues being raised.

MR. MOORE: Your Honor, did you give dates for when notices of deposition would be served and when depositions would begin?

MR. SHLAKMAN: I thought His Honor said notice of depositions on the 18th.

JUDGE LaBELLA: We will do notice of deposition on the 18th and start them on the 19th.

MR. MOORE: Thank you.

MR. PECKINPAUGH: Your Honor, if I may, this was the point I was trying to speak to before. It would be helpful to see the answers to the written discovery before we close the noticing of deposition.

JUDGE LaBELLA: I understand. You may not have that luxury, unfortunately. Well, let's do the answers to written discovery, rather than the 18th, do it by noon on the 18th. That will give you a half-day.

MR. PECKINPAUGH: Thank you, Your Honor.

MR. GOLDBLOOM: Your Honor, when you say the 18th for noticing depositions, is that to be construed as the last date to notice depositions and that, indeed, depositions could be noticed prior to that date and commenced at any time that is reasonable?

JUDGE LaBELLA: Yes.

MR. HOLMES: No, no. I thought you said start the 19th.

JUDGE LaBELLA: I did say that, but I think I misspoke. I think it's quite appropriate in this case that you would start whenever it's convenient.

I don't think there is anything else we need to touch right now. I do want to advise you that you may contact Mr. Burkholder here, who has been appointed a hearing examiner on this case. Particularly with respect to any discovery problems, I would ask you to do that.

Thank you all very much.

[Whereupon, at 3:35 p.m. the proceedings were concluded.]

REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before the BOARD OF CONTRACT APPEALS in the matter of: Protests of Xerox and Volt Information

Docket No.: 8333-P and 8336-P

Location: Washington, D. C.

Date: Wednesday, February 5, 1986

were held as herein appears, and that this is the original transcription thereof for the file of the Department or Commission.

Suzanne B. Young
Signature

Suzanne B. Young
Name

58-478 316

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Board of Contract Appeals

General Services Administration
Washington DC 20405

February 6, 1986

Protests of **XEROX CORPORATION**	GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.	GSBCA No. 8336-P
Solicitation No. RFP 600-S	Acquisition suspended
Appearances for Protester, Xerox Corporation	Irwin Goldbloom, Esquire Thomas L. Patten, Esquire Franklin G. Snyder, Esquire Linda S. Potter, Esquire Latham, Watkins & Hills 1333 New Hampshire Avenue, N.W. Suite 1200 Washington, DC 20036
Appearances for Protester, Volt Information Sciences, Inc.	Thomas F. Williamson, Esquire Marcia G. Madsen, Esquire D. Brent Israelsen, Esquire Morgan, Lewis & Bockius 1800 M Street, N.W. Washington, DC 20036
Appearances for Respondent, U.S. Government Printing Office	James C. Lane, Jr., Esquire Associate General Counsel Office of General Counsel U.S. Government Printing Office North Capital and H Streets, N.W. Washington, DC 2040.
	I. Michael Greenberger, Esquire William S. Moore, Esquire Shea & Gardner 1800 Massachusetts Avenue, N.W. Washington, DC 20036
	Robert S. Gorman, Esquire Contract Law Division U.S. Department of the Army Room 2C439, Pentagon Washington, DC 20310-2208

Appearances for Intervenor, Electronic Data Systems Federal Corporation	Donald C. Holmes, Esquire Joseph D. West, Esquire Michael A. Gordon, Esquire Jones, Day, Reavis & Pogue 655 Fifteenth Street, N.W. Washington, DC 20005-5701
	Richard P. Shlakman, Esquire James D. Duffy, Esquire Electronic Data Systems Federal Corporation 6430 Rockledge Drive Bethesda, MD 20817
Appearances for Intervenor, AT&T Technologies, Inc.	Arthur Lazarus, Jr., Esquire Paul Shnitzer, Esquire Carl J. Peckinpaugh, Esquire Fried, Frank, Harris, Shriver & Jacobson 600 New Hampshire Avenue, N.W. Suite 1000 Washington, DC 20037
Appearances for Intervening Agency, General Services Administration	Richard Shackleford, Esquire Anthony L. Washington, Esquire Claims and Litigation Division Dinah Stevens, Esquire George N. Barclay, Esquire Information Resources and Utilities Division Office of General counsel General Services Administration 18th and F Streets, N.W. Washington, DC 20405

Opinion by Administrative Judge LaBella

The parties to these consolidated protests are the protesters, Xerox Corporation (Xerox), GSBCA No. 8333-P, and Volt Information Sciences, Incorporated (Volt), GSBCA No. 8336-P, an intervenor of right, AT&T Technologies, Incorporated (AT&T)--all three disappointed offerors on the requirements contract, solicitation number RFP 600-S, issued by respondent, the United States Government Printing Office (GPO), for the United States Department of the Army (Army)--the awardee-intervenor of right, Electronic Data Systems Federal Corporation (EDS), and the General Services Administration (GSA), an intervening agency. This opinion reduces to writing the *ore tenus* decision made at the suspension hearing held on February 5, 1986. *Rule 19(d)*. The Board suspended all performance under the GPO-EDS contract until it renders a decision on the merits of these protests. In addition, GPO and the Army are each prohibited from satisfying any of the Army's requirements which would otherwise have been satisfied under the suspended contract. As new requirements arise, respondent will be permitted to petition the Board for a partial lifting of this suspension order and will be granted such, upon a showing that "urgent and compelling circumstances" significantly affecting the interests of the United States dictate that a particular need be procured.

Background

GPO issued the solicitation and proceeded with this procurement without ever having requested or received from GSA authorization to conduct this procurement. Similarly, Army neither requested nor received any authorization from GSA with respect to this procurement, which, as stated in the "General Scope" section of the RFP, "is for a contractor-provided service and an associated contractor-owned equipment and software supporting system, geographically distributed among approximately 200 sites worldwide, to manipulate millions of pages of text and pieces of artwork into composed pages, and to eventually print and bind approximately 26 million page impressions every business day from a publishing base of well over one trillion bytes." Furthermore, the solicitation was to and did result in "a requirements contract for the services and items and for the period specified" tailored to the requirements of the Army. GPO awarded to EDS the contract on Thursday, January 9, 1986.

On January 16, 1986, Xerox filed its protest and simultaneously requested a suspension hearing and a hearing on the merits. On January 21, 1986, Volt filed its protest with the Board, also simultaneously requesting a suspension hearing and a hearing on the merits.[1] The tenth calendar day after award for suspension purposes was January 21, 1986 (the tenth calendar day fell on Sunday, January 19, 1986, and the following Monday was a federal holiday). Rule 2(c).

A suspension hearing was scheduled for February 5, 1986. On February 5, 1986, prior to the hearing, GPO filed notice with this Board that it would not present evidence on suspension. Consistent with this notice, at the hearing GPO and the Army presented no evidence to avoid a suspension. Respondent conceded that it could not establish "urgent and compelling circumstances" to avoid suspension, Transcript at 5-6, and no showing was made that urgent and compelling circumstances existed to fulfill any individual requirement under this contract.

Discussion

These protests were filed after contract award. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (CICA), contains the following directive to the Board regarding suspensions of procurement authority for protests filed after award:

> (A) If the Board receives notice of a protest under this subsection after the contract has been awarded but within 10 days after the contract award, the board shall, at the request of an interested party and

---

[1] The grounds of protest are enunciated in Xerox Corp., GSBCA No. 8333-P, Volt Information Systems, Inc., GSBCA No. 8336-P (Feb. 4, 1986).

> within 10 days after the date of the filing of the protest hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest.
>
> (B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

§ 2713(a), 98 Stat. 1175, 1182 (to be codified at 40 U.S.C. § 759(h)(3)). These provisions are implemented in Rule 19(a)(2), (b), and (d).

The Board is cognizant of the statutory language quoted above which states that "within 10 days after the date of the filing of the protest [the Board is to] hold a [suspension] hearing." However, CICA also provides that:

> The board shall conduct such proceedings . . . as may be required for the expeditious, fair, and reasonable resolution of the protest.

§ 2713(a), 98 Stat. 1175, 1183 (to be codified at 40 U.S.C. § 759(h)(4)(A)). Here, Xerox and Volt each filed its protest within ten days after contract award. In light of the fundamental question raised by EDS and GPO concerning the exemption of GPO from the coverage of the Brooks Act, which would exclude this protest from the Board's jurisdictional authority, we exercised restraint, by not intruding into the procurement process at that time, and at the request of GPO and EDS tolled the period for the convening of a suspension hearing until that issue was resolved. Our opinion of February 4, 1986, holds that GPO is not exempt from the Brooks Act, so that we shall proceed with this protest. With this issue decided, the question of suspension is ripe for a decision.

In this procurement, neither GPO nor Army either requested or received authority from the Administrator of GSA to conduct this procurement. This failure to obtain a delegation of procurement authority (DPA) does not, however, mean that the Board is without the authority to suspend the procurement. Such a restrictive interpretation of CICA would undermine the intent and purpose behind the enactment of the statute to make the Board an effective forum in the ADP protest arena and would be contrary to the mandatory nature of the suspension ("[t]he board shall suspend") which explicitly places the burden on the federal agency to demonstrate "urgent and compelling circumstances" mitigating against suspension. Protesters have rebuttably established the applicability of the Brooks Act to this procurement, so that it appears at this time that GPO failed to obtain the requisite GSA authorization to conduct this procurement and thereby violated a statute. Therefore, GPO's proceeding without the requisite DPA is subjec to the application of the same suspension principles as if it had obtained DPA.

To avoid a suspension, CICA places the burden on the procuring agency demonstrate that "urgent and compelling circumstances" do not permit th waiting for the Board's decision on the merits. Here, GPO and Army made n such showing. Therefore, we suspend the GPO-EDS contract and prohibit GP and the Army from satisfying any of the requirements within the requirement covered under that contract pending our decision on the merits. The Army i not prohibited from fulfilling any of its requirements which do not fal within the requirements which would otherwise be satisfied under th suspended contract.

We recognize that a requirements contract is involved and that Army requirements may arise for which the Army or GPO may be able to demonstrate the existence of "urgent and compelling circumstances" necessitating procurement before we render a decision on the merits. Because we interpret CICA's suspension languag as permitting us to fashion to the specific circumstances of each protest the reach and scope of a temporary suspension, NCR Comten, Inc., GSBCA No. 7698-P, 85-1 BCA ¶ 17,903, if the Army or GPO successfully makes such a showing to the Board on a requirement-by-requirement basis, we leave open the alternative to partially lift the prohibition against satisfying such a requirement.

This suspension does not reach to any portion of the GPO-EDS contract which has been delivered and accepted prior the close of business on February 5, 1986. CICA, § 2713(a), 98 Stat. 1175, 1183 (to be codified at 40 U.S.C. § 759(6)(B)) ("If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation"). However, the suspension applies to any order already placed but not delivered and accepted.

Decision

The GPO-EDS contract is temporarily suspended pending our resolution of this protest on its merits. Subject to the provisions above, this suspension precludes either GPO or the Army from satisfying any of the requirements which would otherwise be satisfied under the suspended procurement.

Vincent A. LaBella
VINCENT A. LaBELLA
Administrative Judge

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Before The

GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS

Washington, D.C. 20405

Protests of

XEROX CORPORATION and
VOLT INFORMATION SCIENCES, INC.

Relating to the Government
Printing Office Solicitation

No. 600-S

GSBCA Nos. 8333-P and
8336-P

NOTICE OF DETERMINATION NOT TO PRESENT EVIDENCE CONCERNING SUSPENSION

Respondent United States Government Printing Office ("GPO") hereby gives notice that for reasons which its counsel will explain at the hearing and pre-hearing conference scheduled for 2:00 p.m. today, February 5, 1986, it will not present evidence on suspension.

Respectfully submitted,

I Michael Greenberger

James C. Lane, Jr.

Associate General Counsel
Office of General Counsel
U.S. Government Printing Office
North Capitol and H Streets, N.W.
Washington, D.C. 20401
(202) 275-2757

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Washington, D.C. 20036
(202) 828-2000

Counsel for Respondent
Government Printing Office

Dated: February 5, 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Determination Not to Present Evidence Concerning Suspension were served this 5th day of February, 1986, by hand delivery to the following:

Irwin Goldbloom, Esq.
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1333 New Hampshire Avenue, N.W.
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(Attorney for Xerox Corporation)

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Richard Shackleford, Esq.
Claims and Litigation Division
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(Attorney for General Services Administration)

Before the

GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS

Washington, D.C. 20405

Protests of

XEROX CORPORATION and
VOLT INFORMATION SCIENCES, INC.

Relating to the Government
Printing Office Solicitation

No. 600-S

GSBCA Nos. 8333-P and
8336-P

NOTICE OF APPEARANCE

Please enter my appearance as a counsel for the Government Printing Office in the above-captioned case.

William S. Moore, Esq.
Attorney for GPO
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

February 5, 1986

William S. Moore

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appearance were served this 5th day of February, 1986, by first class, postage prepaid mail to the following:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION,
Plaintiff,

v.

THE GENERAL SERVICES ADMINISTRATION, and

THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS,
Defendants.

No. ________

(On transfer from the United States District Court for the District of Columbia)

DECLARATION OF HENRY FRY

I, HENRY FRY, declare that:

1. I am the President of Fry Communications, Inc., of Mechanicsburg, Pennsylvania. Fry Communications is a printing company which does substantial business every year as a contractor for the United States Government Printing Office ("GPO"). I have been in the printing business for 25 years. I have been associated with Fry Communications, and its predecessor companies, for all of that time. Fry Communications has operated as a GPO contractor for 14 years. Over the past several years, Fry

Communications has been involved in printing technical, training, and field manuals for the Army, under contracts let by GPO.

2. I am familiar with Request For Proposals No. 600-S, issued by GPO on behalf of the United States Army. I am generally familiar with the facts and issues of these proceedings, and with the Affidavit of Samuel Bruce Scaggs, dated February 14, 1986 (the "Scaggs Affidavit"), and the Declaration of Colonel Raymond Frank Milwee, dated February 13, 1986 (the "Milwee Declaration"), submitted by the Government in these proceedings. The facts contained in this Declaration are of my personal knowledge.

3. Fry Communications is a subcontractor to Xerox Corporation ("Xerox") in Xerox's proposal for the 600-S project. Under the Xerox proposal, the actual offset printing portion of the contract would be subcontracted to Fry Communications, while the automatic data processing ("ADP") portion of the contract would be performed by Xerox.

4. In addition to its printing component, the 600-S procurement requires the installation of considerable amounts of automatic data processing equipment at Army sites around the world, and its integration into an integrated data processing network.

5. Since this is an ADP procurement, it was necessary for Fry Communications, an experienced Government printing contractor, to become a subcontractor to an established ADP firm such as Xerox. To my knowledge, no existing GPO printing contractor has submitted a proposal as a prime contractor for the 600-S program.

6. To my knowledge, GPO never previously has procured ADP equipment for use by, and installation on the premises of, its client agencies.

7. Fry Communications participates as a printing contractor in many of the contracts listed in the Milwee Declaration and the Scaggs Affidavit. Among them, Fry Communications has received print orders and has performed printing under Contracts Nos. 1513-M, 1417-M, 2395-M, 1520-S, 1618-M, 421-M, 2391-M, and 3371-S.

8. Each of the contracts specified in the Milwee Declaration and the Scaggs Affidavit is a requirements contract. These contracts cover printing of Army technical, training, and field manuals. It is my understanding that work which is to be performed under those contracts cannot, under the terms of those contracts, be performed under the 600-S contract. The printing of Army technical, training, and field manuals under the contracts listed in the Milwee

Declaration and the Scaggs Affidavit, while such contracts are in force, is not affected by the 600-S contract.

9. It is my understanding that printing of Army technical, training, or field manuals was performed under several of the contracts listed, and not under the 600-S contract, after the date that the 600-S contract was purportedly awarded. Specifically, print orders have been issued to my knowledge under Contracts Nos. 2395-M, 421-M, and 2391-M. The work which has been and is being performed under these contracts is not part of the 600-S contract.

10. At least one of the contracts listed, Contract No. 2395-M, was awarded after the date that the 600-S contract was purportedly awarded. Bids were opened on Contract No. 2395-M on January 21, 1986. The contract was awarded on February 4, 1986, and is scheduled to run until January 31, 1987.

11. It is my understanding that at least one of the contracts listed in the Milwee Declaration and the Scaggs Affidavit has not yet been awarded. Bids for Contract 3371-S were not opened until February 18, 1986. I understand that as of February 27, 1986, GPO was still evaluating those bids.

12. Several of the other contracts listed in the Milwee Declaration and the Scaggs Affidavit are ongoing printing contracts. It is my understanding that work has been performed under at least some of these contracts since the date the 600-S contract was purportedly awarded. The work being done under these contracts would not be performed by the 600-S contractor.

13. Throughout the 13 months of this procurement, from December 4, 1984, to January 9, 1986, Army technical, training, and field manuals were printed by printing contractors. The Army's printing needs were satisfied by conventional printing methods without resort to the development of the digital data bases and data processing network which is the basis of the 600-S procurement.

14. It is my understanding, and it was emphasized by the Army and GPO, that the 600-S contract would be phased in gradually, and that printing work which was covered by other contracts would continue to be performed under those contracts until they expired. At no time during the course of the 600-S procurement did the Army or GPO indicate that all printing of Army technical, training, and field manuals would be placed under the 600-S contract as soon as that contract was awarded.

15. The printing contractors who participate in the contracts listed in the Milwee Declaration and the Scaggs Affidavit are fully capable of satisfying the Army's need for printing of technical, training, and field manuals, using ordinary printing technology, without installation or use of the ADP networks called for in the 600-S contracts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of March, 1986, at Mechanicsburg, Pennsylvania.

Henry Fry

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELECTRONIC DATA SYSTEMS)
FEDERAL CORPORATION,)
)
Plaintiff,)
)
v.)
)
GENERAL SERVICES BOARD OF)
CONTRACT APPEALS, et al.,)
)
Defendants.

DECLARATION OF WILLIAM J. FLYNN

I, WILLIAM J. FLYNN, state that I have personal knowledge of the facts herein, and if called upon to testify to the facts, I am willing to testify and am competent to do so.

1. I am the Executive Account Manager, U.S. Army, Federal Government Operations, Xerox Corporation ("Xerox"). In that position, it is my responsibility to represent Xerox with respect to all of its products and services to the U.S. Army. As a corollary responsibility, I serve as a liason by which the Army communicates back to Xerox regarding its needs, interests and opportunities. In discharging this function, it is necessary for me to be intimately familiar with the Army's organizational

structure, both military and civilian, and be fully conversant with the Army's information handling requirements.

2. On behalf of Xerox, I reviewed and became familiar with the Request for Proposals ("RFP") No. 660-S issued by the United States Government Printing Office ("GPO") on December 4, 1984. I participated in the development of the proposal submitted by Xerox in response to the RFP. The period from the issuance of the RFP in December 1984 until the purported award of a contract in January 1986 consumed more than thirteen months. During this period, I was in regular contact with Army and GPO personnel, frequently on a day-to-day basis, relating to all aspects of the Army and GPO's interests and needs concerning the 600-S RFP. In order to provide the necessary liason services under the 600-S procurement, it was necessary for me to be intimately familiar with the Army and GPO's present methods of publishing their manuals and their plans for upgrading the process as well as the Government's program for the phasing-in of the new system.

3. In light of the size and scope of the 600-S contract, it was envisioned by the Army and the GPO that a long "phase-in" period would be required in order to analyze, equip, train and continue to upgrade all 200 sites that would be involved in the project. Although the RFP

called for a 60-day period of implementation after award of the contract at five selected sites, it was expected by all concerned that these "priority" sites would require an extended break-in period before substantial amounts of printing could be produced on a routine basis. In accordance with such a "phase-in period", the generally accepted estimates were that a minimum of 120 days would be required before high-volume publications could be produced. Accordingly, it was generally understood by all parties involved in the procurement -- i.e., proposers and government personnel -- that a "cross-over" method would have to be developed in order to change from the existing procedures to the methods to be employed under the 600-S contract.

4. As noted, there was a thirteen-month period from publication of the RFP through the purported award of the contract in January 1986. That period encompassed responses by the proposers in April 1985, questions and clarifications of responses in August 1985, and benchmark testing during October-December 1985. During this extended period of time, new as well as reprinted Army publications were handled on a priority and as-needed basis so as to meet the Army's needs. Moreover, every major command and subcommand as well as all forts and major Army installations have some method of high volume printing capacity either in

the form of a printing plant or a decentralized duplication facility.

5. In light of the ability of the Army to completely fulfill its new and reprint publications needs prior to the purported award of contract 600-S in January 1986, it is hard to understand as contended by the Army and the GPO in their proceeding why priority printing and/or publications at TACOM, TRADOC, MICOM and the Marine Corps requirements cannot be met as in the past with presently available systems or by means of selected subcontracting through the private sector.

I declare under penalty of perjury that the foregoing is true and correct.

WILLIAM J. FLYNN

Executed on 3 / 5 / 1986.

United States
Government
Printing Office
Washington, D.C. 20401

January 31, 1985

Gentlemen:

This is Amendment Number Two to the Request for Proposal for Program 600-S, for the Army Integrated Publishing Service. It includes changes to the original RFP, Questions and Answers from the Preproposal Conference, and a list of the attendees of the Preproposal Conference. Acknowledgement of this amendment is required when proposals are submitted.

Sincerely,

R.E. Lee, Jr.

R. E. LEE, JR.
Superintendent,
Purchase Division.

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SEP 04 1985
XSIS CONTRACTS

AMENDMENT NO. 2 TO THE REQUEST FOR PROPOSAL FOR THE ARMY INTEGRATED PUBLISHING SERVICE PROGRAM 600-S

January 31, 1985

Make the following changes to the Program 600-S Request for Proposal dated December 4, 1985:

On page 1, paragraph 2, the due date for proposals has been changed from January 25, 1984 to March 18, 1985.

On page 1, paragraph 4, replace the words ''Invitation for Bid'' with ''Request for Proposal''.

On page 5, Under General Scope, add following the first paragraph:

By way of clarification, the following is provided:

Program 600-S is predominantly a contract for technical, training, and related literature. The Government is presently under contract with several firms for the printing or creation of many of these publications. All existing contracts will be honored until they expire and some may be renewed until such time as they can be accommodated under Program 600-S.

The estimated quantities in the basis of award are not the total requirements of the Government. The Government reserves the right to produce like (similar to those described in this requirement) products and services in Government facilities, and/or to honor other contractual obligations for similar products and services which may otherwise be procured under this contract.

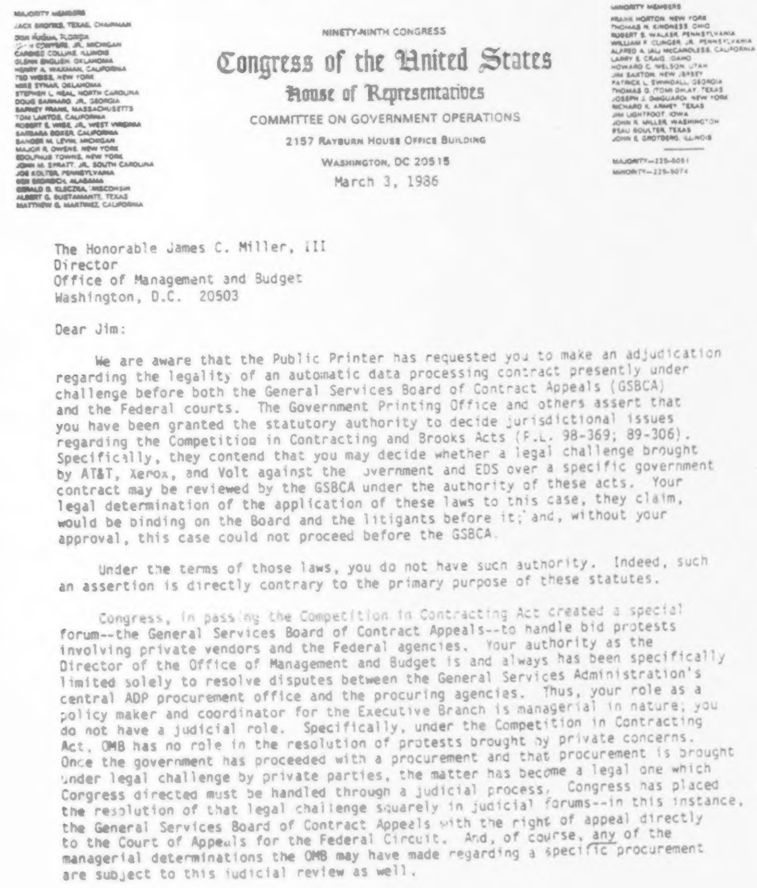
On page 16, item 4, add after the last line in that paragraph:

Because of the need to minimize vulnerability in all phases of the contract, it is preferred that contractor's consider performing printing, binding, and distribution operations at multiple locations. The ability to transfer operations to another location in the event of, for instance, a power blackout or other catastrophe which could adversely affect schedules, will be an important factor. Further, although actual shipping costs cannot be computed as a factor in the pricing evaluation, the ability to select a manufacturing location having the most favorable shipping costs for a specific print order will also be considered. Contractors are to provide a detailed description of the operational capability at each plant proposed, and a contingency plan for moving operations to another plant in the event of unexpected cessation of operations due to any reason.

On page 16, item 6, third line, add a comma between the words ''management'' and ''printing''.

M-9

APPENDIX 9.—JOINT LETTER FROM CHAIRMAN BROOKS AND RANKING MINORITY MEMBER FRANK HORTON TO OMB DIRECTOR JAMES C. MILLER III, MARCH 3, 1986



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MAJORITY—225-5051
MINORITY—225-5074

March 3, 1986

The Honorable James C. Miller, III
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Jim:

We are aware that the Public Printer has requested you to make an adjudication regarding the legality of an automatic data processing contract presently under challenge before both the General Services Board of Contract Appeals (GSBCA) and the Federal courts. The Government Printing Office and others assert that you have been granted the statutory authority to decide jurisdictional issues regarding the Competition in Contracting and Brooks Acts (P.L. 98-369; 89-306). Specifically, they contend that you may decide whether a legal challenge brought by AT&T, Xerox, and Volt against the Government and EDS over a specific government contract may be reviewed by the GSBCA under the authority of these acts. Your legal determination of the application of these laws to this case, they claim, would be binding on the Board and the litigants before it; and, without your approval, this case could not proceed before the GSBCA.

Under the terms of those laws, you do not have such authority. Indeed, such an assertion is directly contrary to the primary purpose of these statutes.

Congress, in passing the Competition in Contracting Act created a special forum--the General Services Board of Contract Appeals--to handle bid protests involving private vendors and the Federal agencies. Your authority as the Director of the Office of Management and Budget is and always has been specifically limited solely to resolve disputes between the General Services Administration's central ADP procurement office and the procuring agencies. Thus, your role as a policy maker and coordinator for the Executive Branch is managerial in nature; you do not have a judicial role. Specifically, under the Competition in Contracting Act, OMB has no role in the resolution of protests brought by private concerns. Once the government has proceeded with a procurement and that procurement is brought under legal challenge by private parties, the matter has become a legal one which Congress directed must be handled through a judicial process. Congress has placed the resolution of that legal challenge squarely in judicial forums--in this instance, the General Services Board of Contract Appeals with the right of appeal directly to the Court of Appeals for the Federal Circuit. And, of course, any of the managerial determinations the OMB may have made regarding a specific procurement are subject to this judicial review as well.

In the House Report 98-1157, which accompanied the Competition in Contracting Act, this division of authority is directly identified:

> "With regard to OMB's authorities under the Brooks Act, the bill does not alter the current procedures for resolving conflicts between procuring agencies and GSA's procurement office under the Assistant Administrator for Information Resources Management. However, the resolution of disputes (outside the courts) between procuring agencies and suppliers or potential suppliers shall be decided solely by the Board...under the procedures established by this bill."

In vesting the authority to adjudicate bid protests in special judicial forums and the Federal courts, both independent of political pressure from within the Executive Branch or elsewhere, the Congress was reacting to years of Federal procurement waste and abuse. Congress had learned through experience that the agencies have resisted implementing reform measures to ensure sound competitive practices. Prior to enactment of the Competition in Contracting Act, studies indicated that as much as two-thirds of all government acquisitions were made on a noncompetitive basis despite laws and regulations requiring competitive bidding. Congress knew that a strong and viable bid protest system, in which private parties police themselves and the government, was needed to force the agencies to adhere to the procurement laws and regulations. In enacting the Competition in Contracting Act, Congress had as its cardinal purpose the creation of a fair and equitable forum in which injured private parties could seek redress from government contracting abuses. That forum, performing a judicial function, was meant to be insulated from political influence and managerial expedience. For OMB to make decisions regarding cases pending before the GSBCA would undercut the primary purpose of the Competition in Contracting Act and mark a return to the old system of rampant procurement waste and abuse which existed prior to enactment of the Competition in Contracting Act.

We urge you to refrain from involving yourself and the OMB in an ongoing bid protest.

Sincerely,

JACK BROOKS
Chairman

FRANK HORTON
Ranking Minority Member

APPENDIX 10.—LETTER FROM CHAIRMAN BROOKS TO ATTORNEY GENERAL EDWIN MEESE III, FEBRUARY 27, 1986, AND RESPONSE FROM JOHN R. BOLTON. ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, TO CHAIRMAN BROOKS, MARCH 4, 1986

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BEAU BOULTER, TEXAS
JOHN E. GROTBERG, ILLINOIS

MAJORITY—225-5051
MINORITY—225-5074

February 27, 1986

The Honorable Edwin Meese III
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Meese:

The Subcommittee on Legislation and National Security of the House Committee on Government Operations has scheduled hearings for Wednesday, March 5, to address the actions taken by the Government Printing Office (GPO) and the Department of the Army to circumvent the Brooks Act (P.L. 89-306). Under this Act, the General Services Administration's Board of Contract Appeals is empowered with the authority to decide bid protests where vendors allege agencies acted improperly or illegally in conducting a procurement. In keeping with this responsibility, the Board recently ruled to suspend a contract awarded by the GPO and the Department of the Army to Electronic Data Systems (EDS) Corporation. This suspension was ordered pending a full hearing by the Board of charges brought by Xerox, AT&T and Volt Industries. These charges include: conflict of interest, violation of procurement law, and other improper, possibly illegal, activities that occurred during the course of this procurement.

Unfortunately, the case has not been heard because the GPO and the Army have gone to great lengths to prevent the Board from adjudicating the case by challenging the Board's authority in the courts and appealing to OMB. During the hearings, the Members will address (1) the reasons why the GPO and the Army are failing to follow the Brooks Act, (2) whether OMB's involvement in this matter represents an unwarranted interference into the quasi-judicial proceedings of the Board, and (3) how the Justice Department can represent both GPO who supported the plaintiff, EDS, in the District Court and GSA, the defendant in the case.

Since the Justice Department has decided to represent both the defendant, GSA, and the plaintiff, GPO/Army, I believe that it is essential that you appear before the Subcommittee on Wednesday, March 5, to explain OMB's role in this case. Other witnesses will include representatives of the Office of Management and Budget, and the Government Printing Office.

These hearings will begin at 10:00 a.m., in Room 2154 of the Rayburn House Office Building. In order that we may adequately prepare for your appearance, we would appreciate receiving 25 copies of your testimony no later than 48 hours in advance of the hearings. In addition, we will need 50 copies of your testimony for public distribution during the hearings.

With best wishes, I am

Sincerely,

Jack Brooks

JACK BROOKS
Chairman

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 04 1986

RECEIVED
MAR 4 1986
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Honorable Jack Brooks
Chairman
Committee on Government
Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of February 27, 1986, to the Attorney General requesting a witness at a March 5, 1986, hearing of the Subcommittee on Legislation and National Security concerning a pending bid protest case.

Due to the great number of requests for Department witnesses before Congressional committees and subcommittees, we have found that the only way to discharge our responsibilities to the Congress in an orderly fashion is to insist upon adequate advance notice of hearings at which we are expected to testify. Toward this end, we have for some years operated under a procedure that invitations for Department personnel to give testimony must be received at least fourteen days prior to the date of the hearing. This allows us time within which to designate a witness, to prepare testimony, to clear the testimony through the Department and OMB, and to submit advance copies of the prepared testimony to the committee or subcommittee 48 hours in advance of the hearings.

Given this background, we are unable to comply with your request for a witness at your March 5 hearing. Should the subcommittee desire to hold a further hearing on this issue later this month, I feel confident that we can provide an appropriate witness.

Sincerely yours,

John R. Bolton
Assistant Attorney General

Appendix 11.—Letter From Chairman Brooks to Public Printer Ralph E. Kennickell, Jr., February 27, 1986, and Response From Mr. Kennickfll to Chairman Brooks, March 4, 1986

[illegible]

NINETY-NINTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON GOVERNMENT OPERATIONS
2157 Rayburn House Office Building
Washington, DC 20515

[illegible]

February 27, 1986

The Honorable Ralph E. Kennickell, Jr.
Public Printer
Government Printing Office
Washington, D.C. 20401

Dear Mr. Kennickell:

The Subcommittee on Legislation and National Security of the House Committee on Government Operations has scheduled hearings for Wednesday, March 5, to address the actions taken by the Government Printing Office (GPO) and the Department of the Army to circumvent the Brooks Act (P.L. 89-306). Under this Act, the General Services Administration's Board of Contract Appeals is empowered with the authority to decide bid protests where vendors allege agencies acted improperly or illegally in conducting a procurement. In keeping with this responsibility, the Board recently ruled to suspend a contract awarded by the GPO and the Department of the Army to Electronic Data Systems (EDS) Corporation. This suspension was ordered pending a full hearing by the Board of charges brought by Xerox, AT&T and Volt Industries. These charges include: conflict of interest, violation of procurement law, and other improper, possibly illegal, activities that occurred during the course of this procurement.

Unfortunately, the case has not been heard because the GPO and the Army have gone to great lengths to prevent the Board from adjudicating the case by challenging the Board's authority in the courts and appealing to the Office of Management and Budget (OMB). During the hearings, the Members will address (1) the reasons why the GPO and the Army are failing to follow the Brooks Act, (2) whether OMB's involvement in this matter represents an unwarranted interference into the quasi-judicial proceedings of the Board, and (3) how the Justice Department can represent both GPO who supported the plaintiff, EDS, in the District Court and GSA, the defendant in this case.

Since the GPO and the Army have taken deliberate actions to circumvent the Brooks Act, I believe that it is essential that you appear before the Subcommittee on Wednesday, March 5, to explain GPO's role in this case. I also request that the appropriate Department of Army officials involved in this procurement accompany you to this hearing. Other witnesses will include representatives of the Department of Justice, and the Office of Management and Budget.

These hearings will begin at 10:00 a.m., in Room 2154 of the Rayburn House Office Building. In order that we may adequately prepare for your appearance, we would appreciate receiving 25 copies of your testimony no later than 48 hours in advance of the hearings. In addition, we will need 50 copies of your testimony for public distribution during the hearings.

With best wishes, I am

Sincerely,

Jack Brooks

JACK BROOKS
Chairman

1861 · 125th ANNIVERSARY · 1986

United States Government Printing Office
Washington, D.C. 20401

OFFICE OF THE PUBLIC PRINTER

March 4, 1986

By Hand

Honorable Jack Brooks
Chairman, Committee on Government Operations
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: March 5, 1986, Hearings

Dear Mr. Chairman:

I am writing in response to your February 27, 1986, letter asking me to appear before your Subcommittee's March 5, 1986, hearings pertaining to the United States Government Printing Office's procurement of integrated printing services for the Department of the Army. My response would have come sooner, but I did not receive your letter until approximately noon yesterday.

As you know, the subject matter of your hearing is the focus of litigation now pending before the United States Court of Appeals for the Federal Circuit. Indeed, late yesterday afternoon, the Chief Judge of the Federal Circuit extended the injunction in effect against the General Services Administration Board of Contract Appeals ("GSBCA") and the General Services Administration ("GSA") pertaining to the procurement about which you inquire. That injunction had been entered initially by a judge of the United States District Court for the District of Columbia prior to the transfer of the litigation to the Federal Circuit. GPO now has pending before the Federal Circuit an emergency petition for writ of mandamus to GSBCA and GSA. We expect that a similar petition will shortly be filed on behalf of the United States.

Given the litigation before the Federal Circuit, it would not be appropriate for me to discuss the very issues to be resolved by that court in a congressional hearing. I have enclosed our most recent set of briefs to the Federal Circuit for your review, as well as a copy of the injunction now in effect. Those briefs fully express our position on this matter. In any event, the issues will be judicially resolved one way or the other in due course.

As the accompanying briefs also demonstrate, the pending litigation entails significant, long-term, practical and financial considerations, not only of GPO but of innumerable other agencies of the federal government. These considerations go far beyond any dispute over the underlying procurement at issue. However, I should also add that we emphatically deny any allegations of wrongdoing pertaining to the procurement. We are fully prepared to meet any such allegations in the legally appropriate forums, i.e., the General Accounting Office ("GAO") or a federal court. This latter fact is fully evident by GPO's full cooperation with the investigation of the procurement by the GAO, an investigation commenced at your direction.

You should also know that the Department of Justice has not represented GPO either in the District Court or in the Federal Circuit and that the Office of Management and Budget's ("OMB") involvement in this matter stems from our February 3, 1986, request to OMB to exercise the intra-governmental dispute resolution procedure provided for in the "Brooks Act" itself. 40 U.S.C. § 759(g). A ruling is expected from OMB by the end of today. Finally, I have forwarded a copy of your letter to Col. R. F. Milwee, Jr., Director of Publications at the Department of the Army and I have asked that he or some other appropriate Army official respond on behalf of the Army to your inquiry.

Upon the conclusion of this litigation, I would be most pleased to appear before the Subcommittee to discuss this matter.

I would also ask that this letter and the enclosures be made a part of the record of any hearing your Subcommittee conducts.

Sincerely,

RALPH E. KENNICKELL, JR.
Public Printer

Enclosures

cc: Honorable Charles McC. Mathias, Jr.
Chairman, Joint Committee on Printing

BEST COPY AVAILABLE

APPENDIX 12.—LETTER FROM JACK LEWIS HIGH, JR., AND DAVID S. REISMAN, SPERRY CORP., TO CHAIRMAN BROOKS, MARCH 4, 1986

SPERRY CORPORATION
INFORMATION SYSTEMS GROUP
8008 WESTPARK DRIVE
MCLEAN, VIRGINIA 22102
TELEPHONE (703) 556-5000

March 4, 1986

The Honorable Jack Brooks
Chairman
Committee on Government Operations
The House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Sperry is pleased to provide a short observation on BOCA performance for the Record.

The Board has accepted and discharged its responsibilities with alacrity. It has done a remarkable job of sticking to its timetables. Each of the Judges is hardworking and a number of them have, or have gained, ADP knowledge. The Board's structured approach to fact finding has been bolstered by its capability to take evidence, examine witnesses, and by full discovery. It has proven to be a most effective vehicle to get at the truth in certain cases. It has already stimulated and will, over time, further stimulate competition. Sperry would encourage BOCA stimulation of true, full, free, and open competition not only between alternative system concepts, but also reinstitution of full and open competition between diverse architectures and manufacturers. We also see a strong role for the BOCA in furthering the use of "de jure" government standards, rather than the use of limited, "de facto", proprietary ones. An effective forum for protests, its resolution rate and percentage of sustained protests are valuable to the integrity and impartiality of the government procurement process.

The scarcity of resources is BOCA's most serious limiting factor; we recommend that Government Operations remedy this limitation. On the basis of our experience to date, we also would reverse our earlier position, and indicate that in certain complex cases 45 days is insufficient for full discovery and depositions.

We do not always agree with BOCA's resolutions and recommend that they be guarded from what may be characterized as agency "exigencies." A weak point in the system, the press of agency business has always been used to "lever" decisions and remedies. The BOCA must also be insulated from possible future adverse agency "backlash" --- which must be considered operative in the case of any institution such as BOCA, operating within a three-year, "probationary" period.

We trust that our observation is useful.

Sincerely,

Jack Lewis High, Jr.
Jack Lewis High, Jr.
Director
Government Marketing Affairs

David S. Reisman
David S. Reisman
Assistant General Counsel

APPENDIX 13.—EXCERPT FROM TRANSCRIPT OF PROCEEDINGS, SWORN STATEMENT OF FRANK McDONOUGH, MARCH 3, 1986

TRANSCRIPT OF PROCEEDINGS

GENERAL ACCOUNTING OFFICE

In the Matter of:)
SWORN STATEMENT OF FRANK MCDONOUGH)
)

Pages: 1 through 40

Place: Washington, D.C.

Date: March 3, 1986

Acme Reporting Company

Official Reporters
1220 L Street, N.W.
Washington, D. C. 20005
(202) 628-4888

A No.

Q Did you feel that under the circumstances, that was the correct decision to make?

A I did.

Q Do you believe -- or did you believe then, or do you believe now that it would have been preferable had GSA not withdrawn as an intervenor, in order to ensure that GSA's position in this matter be represented before the Board?

A No, no, I don't.

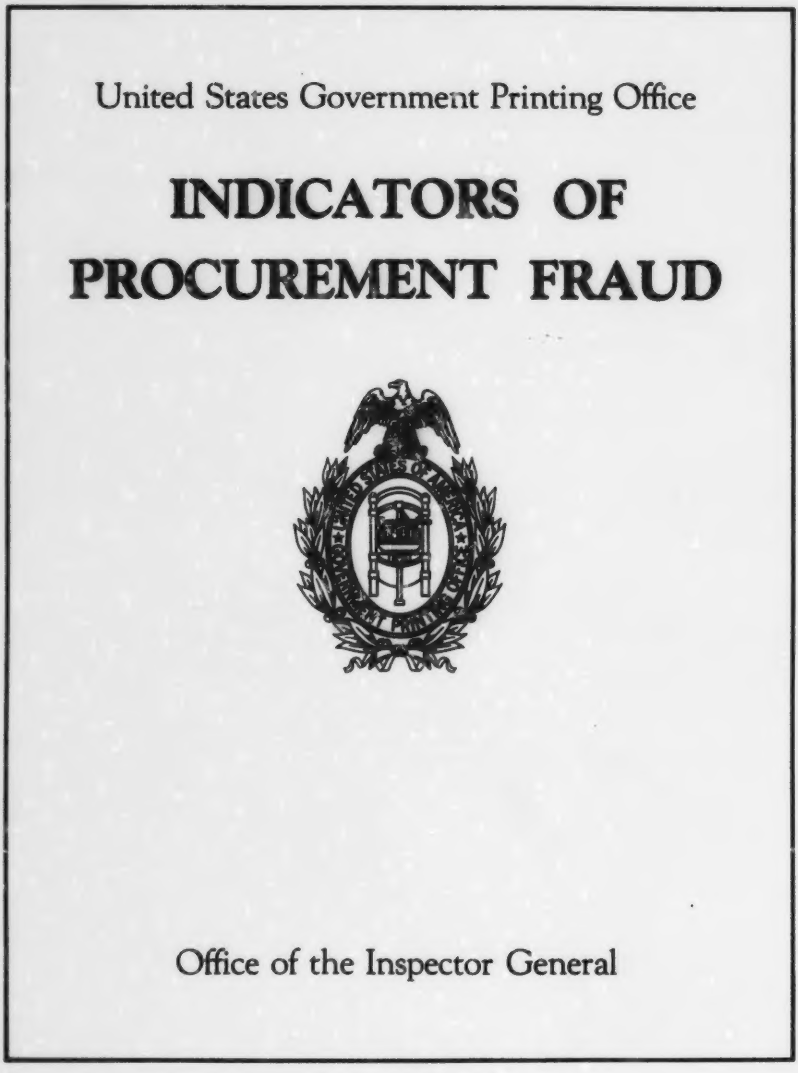
Q Is there -- is there a concern that as a result of withdrawing as intervenor that GSA's position in this matter will not be adequately represented before the Board? Is that or is that not a concern? And explain.

A Not to me.

The real -- the real concern that I have, the audience that is important to GSA's interest in this matter is OMB, not the Board.

(Continued on next page.)

APPENDIX 14.—U.S. GOVERNMENT PRINTING OFFICE, OFFICE OF THE INSPECTOR GENERAL, "INDICATORS OF PROCUREMENT FRAUD," UNDATED



United States Government Printing Office

INDICATORS OF PROCUREMENT FRAUD

Office of the Inspector General

Preface

The United States Government Printing Office (GPO) is indeed, a "Demand-driven, Service-oriented" Agency. Public Printer Kennickell is committed to providing the highest quality, cost-efficient goods and services to GPO clients. There are those, however, who would take advantage of any vulnerability inherent in the GPO system, particularly the procurement process.

The Public Printer and Inspector General therefore are determined to reduce GPO's vulnerability to fraud, waste, abuse, and mismanagement to a zero level. To achieve this goal, the effort and cooperation of all GPO employees are needed. This publication is designed to assist GPO personnel in identifying circumstances where fraud is likely to occur or indicate where it has already occurred. Additionally, available remedies are discussed and the most frequently violated statutes are set forth.

We trust you will use this guide and notify the Office of Inspector General whenever fraudulent or improper activity is suspected.

General

Fraud in Government Contracts

This section discusses factors which may indicate the presence of or enhanced potential for fraud at various stages in the contract award process. The indicators included are not intended, each taken by themselves, to establish the existence of fraud. Rather, the presence of any of these indicators, when taken in the context of the particular procurement action being conducted, should cause GPO employees to be alert to the possibility of impropriety and take appropriate actions to ensure the integrity of the process.

The motives and methods for fraud in the contract award process are varied. There are many instances where fraud is perpetrated to obtain a contract in order to create the opportunity to later engage in such activities as theft or embezzlement, product substitution, cost mischarging, or progress payment fraud. In some instances, the fraud is perpetrated to obtain a contract at a higher price or with better terms than would have occurred in an award untainted by fraud. Still others commit fraud merely to get Government contracts because they need the business to keep their companies in operation when private sector activity is low.

Another factor to be considered is that frauds are sometimes committed by or with the help of GPO employees. The possibility should not be overlooked that a GPO employee has solicited or accepted bribes or gratuities or has a financial interest in a contractor.

Fraud in the Identification of the Government's Need for Goods or Services

Normally, procurement actions are initiated by formal or informal general requirements. These requirements consist of a brief description of the types and amounts of goods and services needed together with a justification for the need. Fraud may result here from decisions to buy goods and services in excess of those actually needed or possibly not needed at all. Needs determinations which are established for items that have scheduled disposal and reprocurement or have predetermined reorder levels may be particularly susceptible to value manipulation.

Further potential for fraud is created where the needs assessment is not adequately or accurately developed. A Government agency which, with or without collusion, continually changes its mind about what it wants will make it possible for a contractor to substantially increase the contract price.

With respect to fraud in defining requirements and stock levels, the general fraud indicators include:

- ☐ Requiring excessively high stock levels and inventory requirements to justify continuing purchasing activity from certain contractors.
- ☐ Declaring items which are serviceable as excess or selling them as surplus while continuing to purchase similar items.
- ☐ Purchasing items, services, or research projects in response to aggressive marketing efforts (and possible favors, bribes or gratuities) by contractors rather than in response to valid requirements.

☐ Improperly defining needs in ways that can be met only by certain contractors.

☐ Failing to develop "second-sources" for items and services being continually purchased from a single source.

Fraud in the Development of Statements of Work and Specifications

Bid specifications and statements of work detailing the types and amounts of goods or services to be provided are prepared to assist in the selection process. They are intended to provide both potential bidders and the selecting officials with a firm basis for making and accepting bids. A well-written contract will have specifications, standards, and statements of work which make it clear what the Government is entitled to. Sloppy or carelessly written specifications make it easy for a contractor to claim that it is entitled to more money for what the Government later defines as what it really wants. Sometimes, there is deliberate collusion between Government personnel and the contractor to write vague specifications. At other times there is an agreement to amend the contract to increase the price immediately after the award.

Fraud indicators include:

☐ Defining statements or work and specifications to fit the products or capabilities of a single contractor.

☐ Advance or selective release by Government employees of information concerning requirements and pending purchases only to preferred contractors.

☐ Using statements of work, specifications, or sole source justifications developed by or in consultation with a preferred contractor (institutional conflict of interest).

☐ Allowing firms participating in the preparation of bid packages to obtain those same contracts or to be subcontractors to the winning contractors.

☐ Designing "pre-qualification" standards or specifications to exclude otherwise qualified contractors.

☐ Splitting up requirements so contractors each get a "fair share" and can rotate bids.

☐ Splitting up requirements to get under small purchase requirements or to avoid prescribed levels of review or approval, e.g., to keep each within the contracting authority of a particular person or activity.

☐ Bid specifications or the statement of work are not consistent with the items included in the general requirements.

☐ Specifications are so vague that reasonable comparisons of estimates would be difficult.

☐ Specifications are not consistent with past similar type procurements.

Fraud in Pre-Solicitation Phase

Fraud indicators include:

☐ Unnecessary sole source justifications.

☐ Falsified statements to justify sole source or negotiated procurement.

☐ Justifications for sole source or negotiated procurement signed by officials without authority or the deliberate by-passing of required levels of review.

☐ Placing any restrictions in the solicitation documents which would tend to restrict competition.

☐ Providing any advance information to contractors or their representatives on a preferential basis by technical or contracting personnel.

Fraud in Solicitation Phase

Fraud indicators include:

☐ Restricting procurement to exclude or hamper any qualified contractor.

☐ Limiting time for submission of bids so only those with advance information have an adequate time to prepare bids or proposals.

- ☐ Revealing any information about procurement to one contractor which is not revealed to all (from either technical or contracting personnel).
- ☐ Conducting bidders conference in a way which invites bid rigging or price fixing or permits improper communications between contractors.
- ☐ Failure to assure that a sufficient number of potential competitors are aware of the solicitation. (Use of obscure publications, publishing in holiday season, providing a vague or inadequate synopsis to Commerce Business Daily, etc.)
- ☐ Bid solicitation is vague as to the time, place, or other requirements for submitting acceptable bids.
- ☐ Little or no control over the number and destination of bid packages sent to interested bidders.
- ☐ Improper communication with contractors at trade or professional meetings or improper social contact with contractor representatives.
- ☐ Government personnel or their families acquiring stock or a financial interest in a contractor or subcontractor.
- ☐ Government personnel discussing possible employment with a contractor or subcontractor for themselves or a family member.
- ☐ Special assistance to any contractor in preparing the bid or proposal.
- ☐ "Referring" a contractor to a specific subcontractor, expert, or source of supply. (Express or implied that if you use the referred business, you will be more likely to get the contract.)
- ☐ Failure to amend solicitation to include necessary changes or clarifications. (Telling one contractor of changes that can be made after award.)

Fraud in the Submission of Bids and Proposals

Fraud indicators include:

- ☐ Improper acceptance of a late bid.
- ☐ Falsification of documents or receipts to get a late bid accepted.
- ☐ Change in a bid after other bidders prices are known. This is sometimes done by mistakes deliberately "planted" in a bid.
- ☐ Withdrawal of the low bidder who may become a subcontractor to the higher bidder who gets the contract.
- ☐ Collusion or bid rigging between bidders.
- ☐ Revealing one bidder's price to another.
- ☐ False certifications by contractor such as:
  - ○ Small business certification;
  - ○ Minority business certification;
  - ○ Information provided to other agencies to support special status;
  - ○ Certification of independent price determination; and
  - ○ Buy-American Act certification.

Falsification of information concerning contractor qualifications, financial capability, facilities, ownership of equipment and supplies, qualifications of personnel and successful performance of previous jobs, etc.

Fraud in the Evaluation of Bids and Proposals

Fraud indicators include:

- ☐ Deliberately discarding or "losing" the bid or proposal of an "outsider" who wants to participate. (May be part of a conspiracy between a Government official and a select contractor or group of contractors.)
- ☐ Improperly disqualifying the bid or proposal of a contractor.

- ☐ Accepting nonresponsive bids from preferred contractors.
- ☐ Seemingly unnecessary contacts with contractor personnel by persons other than the contracting officer during the solicitation, evaluation, and negotiation processes.
- ☐ Any unauthorized release of information to a contractor or other person.
- ☐ Any exercise of favoritism toward a particular contractor during the evaluation process.
- ☐ Using biased evaluation criteria or using biased individuals on the evaluation panel.

Fraud in the Award of the Contract

Fraud indicators include:

- ☐ Award of a contract to a contractor who is not the lowest responsible and responsive bidder.
- ☐ Disqualification of any qualified bidders.
- ☐ Allowing a low bidder to withdraw without justification.
- ☐ Material changes in the contract shortly after award.
- ☐ Advance information concerning who is going to win a major competition can give advantages to persons trading in the stock of both the winning and losing companies.
- ☐ Awards made to the lowest of a very few bidders without readvertising considerations or without adequate publicity.
- ☐ Awards made that include items other than those contained in bid specifications.
- ☐ Awards made without adequate documentation of all preaward and postaward actions including all understandings or oral agreements.

Fraud

Antitrust Violations: Collusive Bidding and Price Fixing

Collusive bidding, price fixing, or bid rigging are commonly used interchangeable terms which describe many forms of illegal anticompetitive activity. The common thread throughout all of these anti-competitive activities is that they involve agreements or informal arrangements between independent competitors which limit competition. Schemes to allocate contracts and limit competition can take many forms and are only limited by the imagination of the parties. Common schemes, which will be discussed in more detail later, include bid suppression or limiting, complementary bidding, bid rotation, and market division. Competitors can also violate the law by making any agreements between themselves concerning the prices they will charge. This does not mean that all competitors have to agree to charge the same price for a violation to occur. Agreements between competitors which would violate the law include but are not limited to: 1) agreements to adhere to published price lists; 2) agreements to raise prices by a specified increment; 3) agreements to establish, adhere to, or eliminate discounts; 4) agreements not to advertise either prices or the quantity, type, or size of product.

(1) *Impact on the Procurement Process*—One of the cornerstones of the Federal procurement system is the requirement that Government contracts should be awarded, to the greatest extent possible, on the basis of free and open competition. The preference for competition in the procurement of goods or services on behalf of the United States was first set by statutes in 1809. This preference still remains and has been specifically expressed in statutes concerning GPO purchases and contracts. GPO Printing Procurement Regulation P-305.3 sets forth the following requirement: "Purchase of and contracts for property and services covered shall be made by formal advertising, and shall be awarded on a competitive bid basis to the lowest responsible bidder in all cases in which the use of such method is feasible and practicable under existing conditions and circumstances."

It should be obvious that collusive bidding or price fixing between competitors completely undermines the Government's efforts to use competitive purchasing and contracting methods. The harm in this situation, however, is not limited to the mere circumvention of important Government policies that encourage free and open competition. In fact, collusive bidding and price fixing result in increased costs, destroy public confidence in the country's economy, and undermine our system of free enterprise.

It has been shown time and time again that collusive bidding and price fixing schemes cause the Government to pay much more for goods or services than it would have if true competition existed. Even if this is the case, the bids involved will often appear to be fair and reasonable. This should not mistakenly be accepted as proof that collusive bidding and price fixing are not occurring or that a violation of law does not exist because the harm in terms of monetary loss is not apparent. In fact, when such conduct is criminally prosecuted, the defendants are prohibited from introducing any evidence to justify their conduct or to demonstrate its reasonableness.

(2) *Indicators of Collusive Bidding and Price Fixing*—The following list of indicators is intended to facilitate recognition of those situations which may involve collusive bidding of price fixing. Use of indicators such as these to identify anti-competitive activity is important because schemes to restrict competition are by their very nature secret and not readily visible. Practices or events that may evidence collusive bidding or price fixing are:

☐ Bidders who are qualified and capable of performing but who fail to bid, with no apparent reason. A situation where fewer competitors than normal submit bids typifies this situation. (This could indicate a deliberate scheme to withhold bids.)

☐ Certain contractors always bid against each other or conversely certain contractors do not bid against one another.

☐ The successful bidder repeatedly subcontracts work to companies that submitted higher bids or to companies that picked up bid packages and could have bid as prime contractors but did not.

☐ Different groups of contractors appear to specialize in Federal, state or local jobs exclusively. (This might indicate a market division by class of customer.)

☐ There is an apparent pattern of low bids regularly re-occurring, such as corporation "x" always being the low bidder in a certain geographical area or in a fixed rotation with other bidders.

☐ Failure of original bidders to rebid, or an identical ranking of the same bidders upon rebidding, when original bids were rejected as being too far over the Government estimate.

☐ A certain company appears to be bidding substantially higher on some bids than on other bids with no logical cost differences to account for the increase, i.e., a local company is bidding higher prices for an item to be delivered locally than for delivery to points farther away

☐ Bidders that ship their product a short distance bid more than those who must incur greater expense by shipping their product long distances.

☐ Identical bid amounts on a contract line item by two or more contractors. Some instances of identical line item bids are explainable, as suppliers often quote the same prices to several bidders. But a large number of identical bid on any service-related item should be viewed critically.

☐ Bidders frequently change prices at about the same time and to the same extent.

☐ Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.

☐ Assertions by employees, former employees, or competitors that an agreement to fix bids and prices or otherwise restrain trade exists.

☐ Bid prices appear to drop whenever a new or infrequent bidder submits a bid.

☐ Competitors exchange any form of price information among themselves. This may result from the existence of an "industry price list" or "price agreement" to which contractors refer in formulating their bids or it may take other subtler forms as discussions of the "right price."

☐ Any reference by bidders to "association price schedules," "industry suggested prices," "industry-wide prices," or "market-wide prices."

☐ A bidder's justification for a bid price or terms offered because they follow the industry or industry leader's pricing or terms, this may include a reference to following named competitors pricing or terms.

☐ Any statements by a representative of a contractor that the company "does not sell in a particular area" or that "only a particular firm sells in that area."

☐ Statements by a bidder that it is not their turn to receive a job or conversely that it is another bidders turn.

Product Substitution

The term "product substitution" generally refers to attempts by contractors to deliver to the Government goods or services which do not conform to contract requirements, without informing the Government of the deficiency, while seeking reimbursement based upon alleged delivery of conforming products or services. It is the policy of the GPO that goods and services acquired must conform to the quality and quantity required in the contract.

(1) Contractors frequently argue that substituted paper delivered to the Government was "just as good" as what was contracted for even if specifications are not met, and that, therefore, no harm is done to the Government. There are several important fallacies to be noted when considering this argument. First and foremost, the substitute is usually not as good as what was ordered in the contract. In cases of product substitution investigated to date, the substitute is usually one of inferior quality or the workmanship is extremely poor because it was done by lesser qualified and cheaper labor.

(2) *Fraud Potential*—There are a wide variety of fraudulent schemes that may involve what is termed product substitution. Many of the recent product substitution fraud allegations involve consumable or off-the-shelf items. Cases have included:

☐ the non-delivery of supplies paid for based upon fraudulent shipping documents;

☐ the delivery of look-alike goods made from nonspecification materials;

☐ materials that have not been tested as required by the contract specifications.

Product substitution cases may involve Government employees. For example, gratuities and bribes might be paid to Government inspection personnel to accept items which do not conform to contract requirements.

Payment Upon Receipt of Invoice of Shipment

This procedure provides for payment based on the contractor's submission of an invoice. The invoice represents that the supplies have been delivered to a post office, common carrier or point of first receipt.

Fraud occurs when a contractor submits an invoice requesting payment for supplies which have not been shipped or delivered to the Government. If the supplies are not in transit or actually delivered at the time the contractor submits the invoice, a criminal violation has occurred. It does not matter if the supplies are subsequently delivered to the Government.

Contractor integrity and honesty are essential for this payment mechanism. Payments are made before GPO is in a position to verify that GPO customers have received what they ordered. It may be weeks or even months before the GPO is advised of either a nonconforming delivery or a nonreceipt. By that time an unscrupulous contractor may have had an opportunity to bill the Government thousands of dollars and to drop out of sight. Because of the potential for large losses, immediate detection of those who have abused the system is necessary.

(1) Since the claim for payment and receipt of goods occur at different locations, communication between paying and receiving points is essential. An employee who becomes suspicious should check with the receiving point to verify that the goods have arrived. Some important things to check for include: not receiving the goods at all; receiving the goods later than would be expected if they were mailed or shipped when claimed; and receiving nonconforming goods. The latter sometimes occurs because the contractor has lost the incentive to perform fully to contract specifications after payment.

Employees should also be alert for indications that the invoice submitted by the contractor is forged or altered in some way to make it appear that the goods were sent. Information on the invoice may raise questions such as shipment on a weekend or holiday.

Bribery, Gratuities and Conflicts of Interest

(1) *Bribery*—In addition to being a crime, the use of bribery and gratuities in obtaining or doing business changes the nature of the Government's relationship with a contractor or potential contractor. It certainly impacts upon the issue of contractor responsibility and possibly the retention of security clearances. It should be remembered that contractors using such methods to do business are usually doing so with the intent to further some form of procurement fraud that they are committing or trying to commit.

There are some primary areas that should be focused on in discussing bribery awareness with employees. These areas of concern can be grouped into several questions.

(2) *What constitutes a bribe?* A bribe is an offer to employees of something of value to (a) do something that he/she should not do or (b) fail to do something they should do, in their official duties. The something of value need not be money, it can be anything of value.

(3) *When is a bribe being offered?* People who offer bribes are generally astute and aware individuals. A blatant offer is a rarity. Generally, the party offering a bribe will make subtle overtures in a conventional fashion. They may begin by discussing the employee's life style, family, or salary. They are looking for a vulnerable area where they can exploit the employee. They may seek to establish that the employee has college-age children and begin discussing the high cost of education. They may learn that the employee is a new homeowner and discuss high mortgage payments and the expenses of fixing up a new home. If unable to detect an area in which the employee is particularly vulnerable, they may move to more glamorous and alluring areas: cash, cars, and travel. In summary, if the employee feels that the individual is getting beyond mere civility and the professional purpose for the meeting, the employee should be alert to the possibility of a bribe attempt.

The preliminary conversation may be an attempt to feel the employee out. The person attempting the bribe knows that bribe offers are illegal. They also know that an employee has an obligation to report the attempted bribe. Most importantly, the offeror of the bribe does not want to get caught. If the employee is not receptive to subtle overtures and alternative attempts fail, the person may not make an overt bribe offer.

(4) *What should be done if a bribe is offered?* The first goal is to establish the nature of the person's remarks. Once the attempt to bribe has been determined, the employee should deftly negotiate out of the situation in order to report the attempt immediately to the OIG. An employee who firmly rejects the offer and then reports the attempt will only be faced with a later denial from the offeror. It is essential that an investigator be involved immediately. Employees may use any of several noncommittal excuses to extricate themselves from the meeting without closing out whatever business was the subject of the meeting. Further, the door should be left open for future contact with the offeror.

The response to the offer must be noncommittal. This allows the employee to break off the contact and return with an answer later so that the later meeting can be monitored by an investigator. It can be more difficult for the employee to be noncommittal if the offer is very blatant and direct.

A noncommittal answer like those suggested below might be appropriate where a direct or blatant offer is involved:

☐ "I don't know, I've never done anything like this, I need to think about it."

☐ I really need to look at some more information first, let me think about it."

☐ "I have to think about that carefully."

☐ "First I need to figure out what's involved here and then I'll get back to you."

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(5) *Commercial bribery and kickbacks*—There are times when payment of bribes and kickbacks do not involve Government employees but still impact on the procurement process. Employees or officers of a prime contractor may solicit or be offered and accept payment of bribes or kickbacks in connection with the award or performance of subcontractors. Subcontractors may initiate such payments to prime contractor employees to obtain competitors' bid or technical data to gain an unfair competitive advantage. Such activities may impact on the procurement process in several ways. The price paid for the product or service may be higher because the subcontractor passes the cost of bribes and kickbacks through to the prime. In extreme instances, the kickbacks may be so significant that the subcontractor cannot perform the work in conformance with specifications or fails to perform at all due to underfunding. In these cases deliveries are delayed or prevented and the ultimate user deprived of the contracted for item.

(6) *Gratuities*—Gratuities are generally distinguished from attempted bribery in that there is usually no request for specific improper action in exchange for what is being given. Gratuities are generally given to assist in enhancing the "relationship" between the offeror and the Government employee. This "more favorable atmosphere" in which to do business may later move the employee to "lean" in the contractor's favor if needed. Some contractors have gone so far in providing gratuities as to actually budget substantial sums (in excess of $35,000 for a project in one case) to create a favorable atmosphere for their dealings with Government employees.

Dealings with those who seek to and who do business with the Government should be conducted in an objective manner, above reproach, and avoiding even the appearance of favoritism or other impropriety. Acceptance of gratuities of any kind should be avoided in order to maintain both the form and the substance of objectivity in official dealings. It should also be remembered that the offer or acceptance of a gratuity is a felony.

(7) *Conflicts of Interest*—GPO employees are generally prohibited by both criminal laws and GPO standards of conduct requirements from taking official actions dealing with businesses in which they or their immediate families have a direct, financial interest. GPO employees should be alert to situations in which they suspect a possible conflict of interest and report these to appropriate authorities, in accordance with GPO Instructions 655.8 series.

Civil, Contractual and Administrative Remedies for Fraud

Traditionally, the GPO has relied upon the criminal justice system to police fraud by GPO contractors. This reliance has included forebearance from certain administrative and contractual actions until the criminal case is completed. However, this reliance is often misplaced for a number of reasons:

First, criminal cases must be proven beyond a reasonable doubt. While there may be insufficient information to warrant a criminal conviction, contracting officials do not need that level of evidence in order to take administrative and contractual action.

Second, even if criminal action is taken, many serious cases are plea bargained down to minor offenses. This tends to confuse many people into incorrectly thinking that there was no proven serious offense. In fact, the actual evidence revealed the significant nature of this criminal conduct, despite the nature of the plea.

Finally, the GPO and not the DOJ is responsible for the integrity of the GPO contracting process. The GPO Printing Procurement Regulation require GPO contracting officials to take positive action on any evidence of contractor impropriety and nonresponsibility. It is therefore necessary for managers and contracting officials to be aware of the civil, administrative, and contracting powers which are available to protect the Government from further loss and to recover Government funds lost through fraud.

(1) *Coordinated Approach to Remedies*—Because GPO officials are responsible for the integrity of GPO contracts, they must be prepared to take immediate action to protect the Government. This often includes positive action while a criminal investigation is underway, and before an indictment or a conviction has been obtained. Criminal cases often take years to complete and GPO can take many contractual and administrative actions on evidence less than that necessary for an indictment or conviction. Often, timely action by a contracting official, such as a preindictment suspension or a contract default termination, will aid the Government by precluding a contractor from continuing to benefit from fraudulent conduct while an investigation is underway.

Furthermore, by taking a coordinated approach to criminal, civil, contractual and administrative actions, the Government is often able to induce guilty contractors into pleading guilty more quickly. Simultaneous consideration of all the remedies available to GPO and DOJ also enables the Government and the court to fashion a single comprehensive remedy package which will punish the contractor, protect the Government, and make the Government whole from any losses suffered.

While early action by contract officials is important, such actions *must* be coordinated with a variety of GPO officials including OIG staff. For example, a recent case involved a GPO employee who was suspected of accepting bribes from a number of GPO contractors. While the criminal case was being investigated by the DOJ, the following related contract and administrative actions were also considered:

(a) Freezing of the employee's retirement account to provide a fund against which the Government could recoup any monies lost;

(b) Termination of any contracts which the contractors had obtained through bribery; and

(c) Suspension of the contractors while the criminal case was underway.

(2) *Civil False Claims Act*—The Government has the right to take civil action against fraudulent contractors based upon a number of statutory grounds. These civil actions are filed by DOJ and may be filed in conjunction with, after, or instead of a criminal prosecution.

The submission of a false claim to the Government can make a contractor liable to the Government both criminally and civilly. The civil False Claims Act, 31 USC 3729–3731, establishes civil liability for false claims. The act provides for a civil penalty of $2,000 per false claim and double the damages suffered by the Government. For example, if a contractor falsely certifies small business status in order to get a small business set aside contract, every claim submitted on the contract is a civil false claim, even if the contractor performs satisfactorily. The Government may recover double the value of the contract, plus $2,000 for every invoice submitted.

(3) *Claims and Litigation*—(See GPO Printing Procurement Regulation P-305.3, Chapter VIII)

(4) *Contract Termination*—(See GPO Printing Procurement Regulation P-305.3, Chapter VII)

(5) *Contractor Suspension and Debarment Procedures*—(See GPO Instruction 110.11A)

(6) *Personnel Actions*—GPO has a variety of remedies to take against Government employees who have colluded with contractors in fraudulent conduct or when a Government employee has engaged in improper actions such as receipt of bribes or gratuities or has been engaged in conflict of interest. These remedies include, but are not limited to:

(a) *Termination*—The receipt of a bribe or gratuity, or actions indicating a personal conflict of interest, can justify the immediate termination of a Federal employee.

(b) *Revocation of a contracting officer's warrant*—Contracting officer's who engage in improper conduct can lose their right to contract on behalf of the Government.

(c) *Recoupment of funds lost*—Whenever a contractor gives a bribe or gratuity to a Government employee, both the contractor and the employee are jointly liable to the Government for an amount equal to the value of the bribe or gratuity. Action can be taken to deduct the value of any such bribe or gratuity from the pension contributions of the employee, prior to the termination of the employee.

Crimes Involved in Contract Fraud

(1) *General*—When the Government and its programs have been defrauded or corrupted, Federal investigators and prosecutors will usually find that one or more Federal statutes has been violated. It is their job to develop conclusive evidence that each of the elements of a specific crime exists.

(2) *Frequently Violated Statutes*—The most frequently violated statutes are discussed below:

(a) *18 USC 1001/False Statements*—Any one of three different types of acts can be covered under this statute if under the jurisdiction of any agency.

- Falsifying, concealing, or covering up a material fact by any trick, scheme, or device;
- Making false, fictitious, or fraudulent statements or representations; or
- Making or using any false document or writing.

(b) *18 USC 287/False Claims*—This includes making any false, fictitious or fraudulent claim against any agency of the U.S. (In a related civil statute, 31 USC 3729, the U.S. can also recover double damages and $2,000 per false claim.)

(c) *18 USC 1341/Mail Fraud & 18 USC 1343/Wire Fraud*—These statutes make it illegal to engage in any scheme to defraud in which the mails or wire communications are utilized. (Even the Government's mailing of a payment check to a contractor can bring the scheme under this statute.)

(d) *18 USC 201–209/Bribery, Gratuities and Conflicts of Interest*—These sections prohibit anyone from offering or giving a bribe to a Federal employee or agent and prohibit an employee from receiving either a bribe or gratuity. They also prohibit conflicts of interest during and after Federal employment. (New authority delegated by the President in November 1983, under USC 218, permits agencies to rescind any contract tainted by bribery, graft, or conflict of interest after conviction.)

(e) *18 USC 1905/Trade Secrets Act*—This prohibits unauthorized release of any information a Federal employee receives confidentially in the course of employment. (Advance procurement information, prices, technical proposals, trade secrets or proprietary information, etc.)

(f) *18 USC 641/Theft, Embezzlement or Destruction of Public Money, Property or Records*—This prohibits the theft, embezzlement or destruction of any money, property or records of the U.S. or the receiving or concealing of such.

(g) *41 USC 51, 54/Anti-Kickback Act*—This prohibits the payment of any fee, compensation, gift or gratuity from a subcontractor to a prime contractor on any negotiated Government contract.

(h) *15 USC 1/Sherman Antitrust Act*—This prohibits any agreement to restrain trade in interstate commerce and includes price fixing, bid rigging bid and rotation schemes.

(i) *18 USC 371/Conspiracy*—This section prohibits any conspiracy to defraud the U.S. or to violate any Federal law or regulation (any offense against the U.S.). It prohibits either an unlawful objective or any unlawful means.

Appendix 15.—Counsel for U.S. Government Printing Office, Emergency Petition for Writ of Mandamus to the General Services Administration Board of Contract Appeals and the General Services Administration, February 28, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. ________________

IN RE: UNITED STATES GOVERNMENT PRINTING OFFICE,

Petitioner

EMERGENCY PETITION FOR WRIT OF MANDAMUS
TO THE GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS AND THE
THE GENERAL SERVICES ADMINISTRATION

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Government Printing Office

Dated: February 28, 1986

* Counsel of Record

CERTIFICATE OF INTEREST

The undersigned counsel of record for United States Government Printing Office, petitioner, furnishes the following list in compliance with Rule 8:

(a) The United States Government Printing Office is the only party represented by undersigned counsel.

(b) The United States Government Printing Office is the real party in interest.

(c) Not applicable.

(d) Shea & Gardner.

I. Michael Greenberger

Counsel of Record for
United States Government
Printing Office

STATEMENT OF ISSUES

1. Whether, if the General Services Administration Board of Contract Appeals ("GSBCA") asserted jurisdiction over this case in violation of statute and its unlawful exercise of jurisdiction would result in severe and irreparable injury to the United States Government Printing Office ("GPO"), the United States Department of the Army and other federal agencies, mandamus should issue to confine GSBCA to its lawful jurisdiction.

2. Whether the Competition in Contracting Act of 1984, 40 U.S.C.A. § 759(h), grants the GSBCA jurisdiction to hear a protest challenging a procurement that was not conducted under the authority of the Brooks Act.

3. Whether the General Services Administration and GSBCA are bound by an Office of Management & Budget resolution under 40 U.S.C. § 759(g) of an inter-agency dispute pertaining to the coverage of the Brooks Act.

4. Whether the GPO is expressly exempted from the Brooks Act by the Legislative Branch Appropriation Act of 1977, Public Law 94-440, 90 Stat. 1460.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. ______________

IN RE: UNITED STATES GOVERNMENT PRINTING OFFICE,

Petitioner

EMERGENCY PETITION FOR WRIT OF MANDAMUS TO THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS AND THE GENERAL SERVICES ADMINISTRATION

Pursuant to 28 U.S.C. § 1651(a), Rule 21 of the Federal Rules of Appellate Procedure, and Rule 21 of the Rules of this Court, petitioner United States Government Printing Office ("GPO") hereby petitions for a writ of mandamus to the General Services Administration Board of Contract Appeals ("GSBCA") and to the General Services Administration ("GSA"). This petition is directly related both factually and legally to Electronic Data Systems Federal Corporation ("EDS") v. General Services Administration Board of Contract Appeals, et al., No. 86-353 (D.D.C.), in which the federal district court, at the behest of the United States, the plaintiff EDS, and GPO (in its capacity as *amicus*), restrained, *inter alia*, a GSBCA bid protest proceeding on grounds of the severe irreparable injury the proceeding had caused to each of these parties. App. A. [1] The district court later transferred the EDS case to this Court, pursuant to 28 U.S.C. § 1631, with the restraining order in place. App. B. We have been advised that the Department of Justice and EDS will file their own papers seeking continued relief restraining the GSBCA protest proceeding.

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[1] "App. ___" refers to the appendix accompanying this petition.

As recognized by the district court, this case encompasses a wide-ranging dispute affecting a great many agencies within the Federal government, including petitioner GPO, the United States Army, the Office of Management and Budget ("OMB"), and the respondents. Unless resolved promptly by this Court, this dispute could lead to a cessation of a substantial portion of the Federal government's printing, including printing urgently needed by the Army, the Air Force and the Internal Revenue Service, and to the loss to the United States Government of millions of dollars. Indeed, the number of agencies affected by this case will grow steadily in the absence of an early dispositive ruling by this Court.

As will be shown below, the inter-agency controversy at hand arises out of jurisdictional questions pertaining to GSBCA's bid protest authority under the Competition In Contracting Act of 1984 ("CICA"), 40 U.S.C.A. § 759(h); OMB's inter-agency dispute resolution authority under the Brooks Act, 40 U.S.C. § 759(g); and the authority of the GPO to procure printing under 44 U.S.C. § 501, ff., and Public Law 94-440. An immediate dispositive ruling by this Court would resolve on a permanent and government-wide basis the manner in which inter-agency disputes of this nature should be resolved. In the absence of such a ruling, large numbers of contracts throughout the Government will not be let because federal agencies will be uncertain about their procurement responsibilities under the law.

Accordingly, GPO, in related papers filed today, asks this Court to consolidate this emergency petition with the transferred EDS case; to extend the restraining order now in place in the EDS case as a temporary stay so as to avoid irreparable injury pending this Court's resolution of the jurisdictional disputes at hand; and to order the parties to this controversy to comply with an expedited briefing schedule that would allow this Court promptly to take these important issues under advisement. In the present petition, we show that a final writ of mandamus confining the GSBCA to its statutory jurisdiction should be issued on an emergency basis.

The factual background to this petition is described immediately below.

STATEMENT OF THE CASE

The inter-agency controversy at issue here arises out of a GPO procurement for integrated publishing services regarding Army technical and training manuals. The procurement was conducted pursuant to GPO Request for Proposals No. 600-S issued on December 4, 1984. Following lengthy competitive negotiations, best and final offers ("BAFOs") were due on December 16, 1985. GPO received BAFOs from AT&T Technologies, Inc. ("AT&T"), Electronic Data Systems Federal Corporation ("EDS"), Volt Information Sciences, Inc. ("Volt"), and Xerox Corporation ("Xerox"). On January 9, 1986, GPO awarded the 600-S contract to EDS. This

$300,000,000 contract covers five years of the Army's most important printing needs.

AT&T filed a protest with the General Accounting Office ("GAO") on January 9, 1986. Xerox and Volt filed protests with the GSBCA on January 16 and 21, 1986, respectively. The latter protests assert that the GSBCA has jurisdiction on the ground that the 600-S procurement was for general purpose automatic data processing equipment ("ADPE") and hence should have been conducted pursuant to the Brooks Act, 40 U.S.C. § 759. AT&T, GSA, and EDS subsequently intervened in the GSBCA proceeding. The GAO subsequently dismissed AT&T's protest in deference to the GSBCA filings, noting that AT&T could timely refile at GAO if the GSBCA ruled that it lacked jurisdiction.

The Brooks Act was enacted in 1965 to provide the GSA with authority to procure "all general purpose ADPE [automatic data processing equipment] used by Federal agencies." 47 Comp. Gen. 275, 277 (1967). The Brooks Act, in turn, was amended by the CICA, 40 U.S.C.A. § 759(h), which gave the GSBCA jurisdiction over protests challenging procurements conducted under the authority of the Brooks Act. If, however, GSA and another agency cannot agree on whether a procurement must be conducted pursuant to the Brooks Act, OMB is by statute charged with resolving that controversy within the Government. 40 U.S.C. § 759(g).

It is conceded by all parties to this proceeding that GPO did not conduct the 600-S procurement or let the 600-S contract under the authority of the Brooks Act. GPO did not conduct the procurement under the Brooks Act for two separate reasons. First, GPO contends, and the United States agrees, that it is exempt from the Brooks Act by virtue of the express exemption provided GPO within Public Law 94-440. See also Memorex Corp., 57 Comp. Gen. 865, 871 (1978). Second, while acknowledging that the procurement at issue involves computer-assisted publishing and printing, GPO maintains that it does not involve general purpose ADPE. The computerized services required by the procurement are directed solely toward the limited function of achieving integrated printing services for the Department of the Army.

Notice that the procurement at issue was not conducted under the Brooks Act was given to all of the offerors. GPO's advertisement for the procurement in the October 16, 1984, Commerce Business Daily did not contain the code required for an ADPE procurement. See 48 C.F.R. § 5.207 (1985). If, despite that notice, the offerors had any doubts that the procurement was not being conducted under the Brooks Act, they could have simply asked GPO at any time during the course of this extensive negotiated procurement. Moreover, the competitors could have ascertained that fact by checking with the GSA Central Office, which makes available for inspection all GSA delegations of procurement authority under the Brooks Act. 46 Fed. Reg. 26178 (1981).

Despite having been on notice since October 1984 that this was not a Brooks Act procurement and despite having never before contended that the Brooks Act applies to the procurement at issue, Xerox, AT&T, and Volt claimed for the first time before the GSBCA that the procurement should have been conducted under the Brooks Act. EDS and GPO moved to dismiss the protests on the ground that GSBCA had no jurisdiction over the procurement.

On January 30, 1986, the GSBCA heard argument on this jurisdictional question. At that hearing, GSA counsel informed GSBCA that GSA believed that GPO was not totally exempt from the Brooks Act, but that GSA could not tell from the face of the procurement whether the procurement was for ADPE and thus governed by the Brooks Act. App. C at 18-20. GSA counsel further acknowledged that "printing services procurements which include ADP[E] . . . would not fall within the Brooks Act" and that, if the ADPE within the procurement were either "special purpose" or "unseverable" from the printing services, the procurement would not be subject to the Brooks Act. Id. at 19. The Board ordered GSA counsel to submit by the next day a written memorandum on whether the Brooks Act applies to the 600-S procurement. Id. at 21.

Accordingly, on January 31, 1986, GSA filed a memorandum with GSBCA finding, "based on a review of the RFP alone," that the procurement at issue was for general purpose ADPE and thus within the Brooks Act's coverage. App. D at 25. Having been confronted for the first time with a GSA assertion that the procurement at issue was covered by the Brooks Act, GPO submitted this inter-agency controversy to OMB by a letter dated February 3, 1986. See App. E. That letter was also filed with GSBCA. App. F. OMB later informed GSA and GPO that it would rule on the matter no later than March 4, 1986. App. G.

On February 4, 1986, GSBCA issued an opinion finding that it had jurisdiction over the protest at issue; that GPO was not statutorily exempt from the Brooks Act; that GSBCA was not bound by the upcoming OMB determination under 40 U.S.C. § 759(g); and that there was a strong rebuttable presumption that the procurement at issue was for ADPE. App. H at 46, 47.

On February 5, 1986, GSBCA, pursuant to 40 U.S.C.A. § 759(h)(3), suspended the procurement at issue pending resolution of the protest and further enjoined GPO and the Department of the Army from doing any printing that would otherwise have been done under the contract unless the Army and GPO convince GSBCA, pursuant to case-by-case adjudications, that a particular printing need constitutes "'urgent and compelling circumstances' significantly affecting the interests of the United States . . ." App. I at 50. 2/

An expedited discovery schedule, including provision for interrogatories, depositions, document production, and requests for admission, was then established by GSBCA for purposes of the adjudicatory hearing on the protests. The adjudicatory hearing was to have commenced on March 6, 1986. However,

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2/ The GSBCA had consistently refused to allow the Army to be a party to this proceeding even though GSBCA was entering injunctive relief against that military service. App. J at 54-56. The Board reasoned that the Army did not need to be a party because GPO counsel could represent that branch's interests. Id. at 55. On February 14, 1986, the same day the United States sought in the EDS case injunctive relief grounded on irreparable injury GSBCA had caused the Army, GSBCA finally granted a renewed Army motion to allow it to be a party to the GSBCA proceeding. App. K.

before discovery had even begun, GPO was required by GSBCA to compile, within a few days, files for the Board and other parties consisting of over 120,000 pages of documents. Moreover, under GSBCA's discovery schedule, Xerox and AT&T served on GPO over 400 interrogatories and accompanying requests for documents which had to be answered by GPO within six days, including a weekend, and to which objections had to be filed in 24 hours. App. L.

On February 7, 1986, two days after GSBCA suspended the GPO-EDS contract, EDS filed suit in the United States District Court for the District of Columbia and asked that court to restrain temporarily the GSBCA proceeding and the GSBCA suspension. That same day, the district court denied the restraining order without prejudice to its renewal, finding that the existing record did not demonstrate irreparable injury. App. M. The court at the same time established an expedited briefing schedule on EDS' motion for a preliminary injunction. Id. at 67.

On February 14, 1986, the Department of Justice filed a brief in the district court on behalf of the defendant GSA and the U.S. Army, agreeing with EDS and GPO on the merits of the controversy; asking for injunctive relief on grounds of severe irreparable injury suffered by the Army as a result of the GSBCA's orders; and moving to transfer the case to this Court on the ground that this Court has exclusive jurisdiction over GSBCA. An affidavit of an Army official accompanied the Justice Department's papers which demonstrated in graphic detail the harm emanating to the Army from its inability to get its printing done due to the GSBCA's orders. See App. N. The U.S. Army affidavit stated that the GSBCA orders may "endanger the health and safety of soldiers . . . and adversely impact on equipment and unit readiness." Id. at 72.

GPO also moved on February 14, 1986, to intervene in the EDS district court suit and for a temporary restraining order. GPO's affidavit showed that the GSBCA suspension order would, at a minimum, cost the GPO hundreds of thousands of dollars; that, because of the uncertainty over the legality of the GPO-EDS contract, GPO could not let other important printing contracts to IRS, the Air Force, the Office of Personnel Management, and the Social Security Administration; and that the resources of GPO were strained to the breaking point in coping with GSBCA's discovery and adjudicatory hearing requirements including GSBCA's order to produce over one hundred thousand pages of documents even before discovery had commenced. App. O at 77-79.

On February 18, 1986, the district court held a hearing on the requests for a temporary restraining order. On February 19, 1986, the district court entered a temporary restraining order enjoining the GSBCA protest proceeding and the GSBCA suspension. That restraining order expires on March 5, 1986 or when OMB rules on GPO's submission to that agency, whichever occurs first. App. A at 8. 3/ The district court concluded that the expense incurred by GPO under the suspension order, the burden of the GSBCA pro-

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3/ The district court mistakenly stated that EDS asked OMB to resolve the inter-agency dispute at issue. As Appendix E shows, it was GPO that put the inter-agency controversy before OMB.

ceedings on GPO, and the inability of the Army to fill its urgent printing needs outweighed any injury that would be incurred by temporarily enjoining the proceedings and lifting the suspension. The Court also grounded the order on the fact that the "pending OMB procedure may resolve the parties' concerns about the propriety of the GSBCA proceedings in 14 days. . . . In order to prevent OMB's ruling from being a nullity, and to permit this threshold dispute to be resolved without unnecessary litigation, the GSBCA proceeding should be stayed to give OMB a chance to rule." Id. at 4, n.2.

On February 21, 1986, the district court granted the Department of Justice's motion to transfer EDS' action to this Court pursuant to 28 U.S.C. § 1631. App. B. The Court found that the jurisdictional issues raised by this case "would have a significant effect on the Federal Circuit's jurisdiction" and that therefore only this Court should resolve those issues. Id. at 15-16. The district court ordered its February 19, 1986, temporary restraining order to remain in effect until either that order's expiration on March 5, 1986, any interim action by this Court, or any decision of OMB, whichever occurs first. Id. at 16.

REASONS FOR GRANTING THE WRIT

SUMMARY

A writ of mandamus or prohibition should issue to confine GSBCA and GSA to their lawful jurisdiction under the Brooks

Act and to preserve the statutorily conferred jurisdiction of OMB, acting under the supervision of the President of the United States, to resolve inter-agency disputes arising under that statute. The exercise of this Court's supervisory powers is now required to avoid useless and burdensome proceedings and to provide much needed guidance to all agencies of the Federal government as to the scope of their procurement responsibilities under the Brooks Act.

In assuming jurisdiction over the protests at issue, the Board exceeded its statutory jurisdiction in three basic respects. First, the Board fundamentally misperceived its own place in the decisional system established by Congress in the Brooks Act, as amended by CICA. The Board overrode the plainly defined limitation of its bid protest jurisdiction to cases in which the applicability of the Brooks Act to the procurement has been resolved prior to the procurement and the procurement was therefore conducted under the Brooks Act. This limitation makes sense because there are mechanisms by which a dispute concerning the applicability of the Brooks Act to a procurement can be resolved at any stage of the procurement process, including specifically a procedure in the Brooks Act for referring such disputes between GSA and a procuring agency to OMB. Second, the Board rendered nugatory the procedure established in the Brooks Act for referring disputes between a procuring agency and GSA concerning applicability of the Act to OMB. Although GPO has referred to OMB the question whether the challenged procurement is subject to the Brooks Act, GSBCA insisted upon deciding that question and stated that it would not be bound by OMB's resolution of the issue. Third, having unlawfully reached out to decide whether this GPO procurement should have been conducted pursuant to a delegation of procurement authority from GSA under the Brooks Act and having stated that it will not defer to OMB's view of the matter, GSBCA erred in failing to recognize that GPO has been granted an express, continuing exemption from the Brooks Act by Public Law 94-440.

1. In Part I we show that this is a compelling case for exercise by this Court of its mandamus jurisdiction. In this regard, GSBCA's violations of governing statutes (which are demonstrated in subsequent parts of the brief) have resulted in a clearly unlawful and unwarranted exercise of jurisdiction by GSBCA over this case. If GSBCA's unlawful exercise of jurisdiction is not corrected by this Court now, that usurpation of power will result in a completely useless proceeding which will be very burdensome to GPO, and the Army's important printing needs affecting military preparedness will not be met while that proceeding is in progress. GPO's situation is made much worse by the fact that OMB, the forum which GPO believes is authorized to resolve the existing dispute, has announced it will rule within the next week and yet the GSBCA has stated it will not abide by OMB's decision. Moreover, the Department of Justice agrees with GPO that the GSBCA has acted outside the scope of its jurisdiction. Thus, GPO will be faced with the prospect of complying with GSBCA's orders even though other government entities which GPO considers more appropriate arbiters of the dispute have

stated that GPO should not have to comply with those orders. Furthermore, the serious adverse effects of continuation of the Board proceeding in this case will not be limited to this one case or to GPO and the Army. As long as the issues raised in this petition remain unresolved, GPO will not be able to make procurements to meet the urgent printing needs of other government agencies, including particularly those of the Internal Revenue Service and the Air Force. Procurements of many other agencies will also be adversely affected, resulting in increased costs and inefficiency throughout the government. In light of these severe and irreparable injuries that will occur if GSBCA is not confined to its lawful jurisdiction, this important case is a particularly appropriate one for the issuance of mandamus.

2. In Part II, we first explain that GPO has exclusive authority over the public printing of the United States. The 600-S procurement was from its inception conducted pursuant to that authority and not pursuant to a delegation of procurement authority ("DPA") from the GSA under the Brooks Act. All the competitors were on notice of this, as was the public at large, and no one raised objection to it with GPO or any other appropriate agency or court. After the contract was awarded, however, two unsuccessful offerors protested to the GSBCA, invoking that Board's jurisdiction under CICA on the ground that the procurement should have been conducted under the Brooks Act pursuant to a DPA from GSA.

The Board's jurisdiction over bid protests is both conferred and defined by Section 2713 of CICA, 98 Stat. 1175, 1182 (1984), 40 U.S.C.A. § 759(h). Recognizing that the issue of the applicability of the Brooks Act to a procurement would be resolved in other forums, including OMB, Congress in CICA granted GSBCA jurisdiction only over challenges to procurements "conducted under the authority of [the Brooks Act]," and the remedial powers granted to the Board by the CICA extend only to suspending the Brooks Act procurement authority of the GSA or the GSA's delegation of Brooks Act procurement authority to a procuring agency. The statutorily conferred jurisdiction and remedies cannot be stretched to apply to GPO's 600-S procurement, which was, all agree, conducted pursuant to the Public Printer's exclusive authority to supply printing for the Federal Government. While the protesters, after losing the competition, complain that the procurement should have been conducted by GSA or by GPO pursuant to a delegation of Brooks Act procurement authority from GSA, the GSBCA was not given authority to decide that a coordinate department of the federal government erred in determining that a procurement need not go through GSA.

3. Part III explains that the Brooks Act expressly grants OMB, acting for and subject to the direction of the President, the authority to resolve disputes between GSA and procuring agencies regarding the applicability of the Brooks Act to a particular procurement. While CICA granted the GSBCA jurisdiction over bid protests challenging procurements conducted under the authority of the Brooks Act, the legislative history of the CICA makes clear that Congress did not intend the Board's protest jurisdiction to affect OMB's authority to resolve conflicts

between procuring agencies and GSA as to the applicability of the Brooks Act. In the present case, as soon as GPO first learned that GSA thought that the Brooks Act might be applicable to the 600-S procurement, it referred the matter to OMB for resolution. OMB has advised GPO and GSA that it expects to make its determination not later than March 4, 1986. Congress intended such a determination to resolve conclusively such disputes so far as the agencies and their boards are concerned. But GSBCA has announced that it will not abide by OMB's decision, stating that "[t]his Board is not bound to OMB's view of the matter." App. H at 46. This Court should act to preserve OMB's authority to resolve the intra-governmental dispute; and if OMB rules that the Brooks Act does not apply to this procurement, this Court should direct GSBCA to abide by that determination.

4. Finally, in Part IV, we explain that having unlawfully taken it upon itself to decide the applicability of the Brooks Act to the 600-S procurement, GSBCA plainly erred in concluding that the Brooks Act did apply. Congress expressly granted GPO an exemption from the Brooks Act in Public Law 94-440, 90 Stat. 1460 (1976). The Board found that because this exemption was granted in connection with an appropriation statute for fiscal year 1977, it expired at the end of that fiscal year. As shown in Part IV, however, the language and legislative history of that exemption show that it was and is a permanent law. For this reason as well, then, the Board plainly erred in assuming jurisdiction over the Xerox et al. protests.

I. THIS COURT HAS JURISDICTION TO GRANT MANDAMUS IN THIS CASE AND, PARTICULARLY IN LIGHT OF THE GOVERNMENT-WIDE IMPLICATIONS OF THE INTER-AGENCY DISPUTE AT HAND, MANDAMUS IS CALLED FOR HERE

This Court would have exclusive jurisdiction of any appeal of a final decision of the GSBCA in this case. 28 U.S.C. § 1295(a)(10), 41 U.S.C. § 607(a)(1), 40 U.S.C.A. § 759(h)(6)(A). As a result, under the All Writs Act, 28 U.S.C. § 1651(a), this Court has the "'power in proper circumstances . . . to issue writs of mandamus reaching' the case." Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., 717 F.2d 1374, 1379, 219 U.S.P.Q. 577 (Fed. Cir. 1983), quoting La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

Mandamus is clearly proper where necessary to confine a court or agency "to a lawful exercise of its prescribed jurisdiction" or to correct a "usurpation" of power by an agency or court. E.g., Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., supra, 717 F.2d at 1379-80 (mandamus issued to prevent case from unnecessarily going to trial as the result of a district court's failure to apply collateral estoppel); In re Mark Industries, 751 F.2d 1219 (Fed. Cir. 1984) (mandamus issued to prevent a clear abuse of discretion, including application of the wrong burden of proof at trial). See Toro Co. v. Hardigg Industries, Inc., 549 F.2d 785, 788, 193 U.S.P.Q. 149 (C.C.P.A. 1977) (holding appealable a refusal to give res judicata effect to an earlier case because interlocutory review of that refusal would "avoid the continuing pendency and possible conduct of an unnecessary and burdensome proceeding").

Mandamus should also be issued when that clearly would prevent a "useless trial," particularly when an "important, undecided issue" is involved and correction of the error regarding that issue would "forestall future error" and "eliminate uncertainty" in other proceedings. Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975). Accord, e.g., Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., supra, 717 F.2d at 1380 (discussed above); In re Mark Industries, supra (discussed above). See Toro v. Hardigg Industries, Inc., supra, 549 F.2d at 788 (discussed above).

Under these standards, this case is a compelling one for the issuance of mandamus. As we demonstrate below, GSBCA has "usurped" power by asserting jurisdiction under the Brooks Act which it does not have. Moreover, this Court must act now to prevent the improper "usurpation" of power by GSBCA. If this Court were to wait until after GSBCA had reached a final decision in this case, its review would not be "meaningful" because GSBCA would already have improperly exercised its power by holding a trial that should never have been held. Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., supra, 717 F.2d at 1380 (subsequent review of district court's failure to apply collateral estoppel would not have been "meaningful" because the case would already have gone to trial). Indeed, as indicated above, the fact that the GSBCA's erroneous action would result in a "useless trial" is itself grounds for mandamus even apart from the fact that that erroneous action results in a "usurpation" of power.

GPO's situation is, moreover, exacerbated by the fact that different entities have different views concerning the proper means of resolving the issues presented in this case. GPO's interpretation of the Brooks Act is that OMB should resolve these issues, and OMB and the Department of Justice have expressed agreement with that interpretation. We believe the District Court also demonstrated considerable sympathy with that position when, in granting the temporary restraining order now in effect, it stated:

> "Although plaintiff's challenge to GSBCA's authority does not alone compel relief from the Board's ruling, the ruling from OMB may resolve the challenge. In order to prevent OMB's ruling from being a nullity, and to permit this threshold issue to be resolved without unnecessary litigation, the GSBCA proceeding should be stayed to give OMB a chance to rule." App. A at 3-4, n.2 (emphasis added).

However, GSBCA has stated flatly that it plans to proceed no matter what OMB may decide (App. H at 46), and thus to render OMB's ruling a "nullity." As a result, the GPO is faced with precisely the same situation which in Atlantic Richfield Co. v. United States Department of Energy, 769 F.2d 771, 783-84 (D.C. Cir. 1984), was held to require immediate judicial relief: "the dilemma of having to choose between complying with allegedly ultra vires [agency orders] * * * and flouting the orders and facing the consequences should the [agency] ultimately be found to have had the power to issue the orders." See Thomas v. Union Carbide Agricultural Products Co., 87 L.Ed. 2d 409, 420 (1985) ("the continuing uncertainty and expense" of proceeding in a forum "whose authority is undermined" constitutes "'palpable and considerable hardship'" warranting immediate review). Thus, to prevent a "usurpation" of power by GSBCA and a "useless" and "burdensome" proceeding before it, this Court should act now to confine the GSBCA to its lawful jurisdiction. [4/]

Mandamus is also called for here to eliminate error and uncertainty in a number of other proceedings. This petition presents "important, undecided issues" concerning the jurisdiction of GSBCA under the Brooks Act that will arise in other cases. That is demonstrated by the fact that one of those issues -- the issue whether only OMB is authorized to resolve disputes between GSA and other agencies concerning application of the Brooks Act -- has already been raised in a case before the Board. SDA Federal Systems, Inc., 85-3 BCA ¶18,493 (October 18, 1985). If this Court were not to resolve the important jurisdictional issues raised by this petition, those issues would undoubtedly be raised and passed on by GSBCA in several other cases before an appeal from a final decision by GSBCA in this case could be decided. As a result, when those issues were eventually decided by this Court, it is quite likely that a number of "useless trials" would already have been held. To

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[4/] The jurisdictional issues raised in this petition are issues of statutory construction which do not depend upon the resolution of any disputed factual issues. Accordingly, these issues are as suited for resolution now as they would be following a final decision by GSBCA. See In re Mark Industries, supra, 751 F.2d at 1222 (this Court could appropriately act by mandamus because it would "apply the same patent law" as it would "in considering any appeal in the case").

prevent such inefficient administration of justice and wasteful expenditure of resources, this Court should now decide the jurisdictional issues presented in this petition. See e.g., Toro Co. v. Hardigg Industries, Inc., supra, 549 F.2d at 788 (interlocutory review appropriate to "avoid the continuing pendency and possible conduct of an unnecessary and burdensome proceeding"); Colonial Times, Inc. v. Gasch, supra, 509 F.2d at 524.

Cases before the GSBCA are not the only proceedings that will be infected with error and uncertainty if the jurisdictional issues raised in this petition are not resolved promptly. Under the GSBCA's rulings, agencies can expect disappointed offerors to bring protests before the GSBCA whenever it can conceivably be said that general purpose ADPE is involved in a procurement. As a result, in each situation where an agency does not believe a procurement is subject to the Brooks Act, but a claim to that effect is possible, the agency will have to decide whether to proceed with the procurement under its own authority, to conduct the procurement under the Brooks Act even though it does not believe that that is required, or to postpone the procurement despite its needs. For example, GPO cannot afford to risk incurring the substantial costs of trials before the GSBCA, but it is unwilling to compromise its statutory rights and undergo the burden of conducting procurements under the Brooks Act when it firmly believes that that is not required. As a result, it has reluctantly decided that it must defer making procurements that by any stretch of the imagination involve procurement to satisfy the urgent printing needs of other agencies, particularly the Internal Revenue Service and the Air Force. App. O at 77. The scope of these irreparable injuries is detailed in GPO's motion, filed concurrently with this petition, to extend the restraining order presently in place in this dispute. In light of such severe and irreparable injuries, which would also affect many other agencies besides GPO and the Army, this Court should act now to clear up the confusion that exists with respect to the procedures to be followed in resolving whether a procurement is governed by the Brooks Act.

For all these different reasons, then, this case is a compelling one for the exercise by this Court of its mandamus jurisdiction. 5/

5/ This Court has indicated that the availability of another means of obtaining relief before trial can be a consideration in determining whether to grant mandamus. See Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., supra, 717 F.2d at 1380. Here, the only other possible means of correcting GSBCA's erroneous assertion of jurisdiction would be an appeal to this Court, if such an appeal is available. In our view, GSBCA's jurisdictional ruling should be considered appealable for precisely the same reasons discussed above in support of mandamus. See Toro Co. v. Hardigg Industries, Inc., supra, 549 F.2d at 788 (refusal to give res judicata effect to earlier case was appealable because interlocutory review of that refusal would "avoid the continuing pendency and possible conduct of an unnecessary and burdensome proceeding"); Tenneco Resins, Inc. v. Reeves Bros., Inc., 736 F.2d 1508, 1511-12, 222 U.S.P.Q. 276 (Fed. Cir. 1984) (relying in large part on Toro Co., this Court held that failure to allow amendment of a counterclaim was appealable because of considerations of "judicial economy"). Accordingly, if this Court believes it desirable to treat GSBCA's jurisdictional ruling as appealable rather than grant mandamus to correct that ruling, we ask that it treat this petition as a notice of appeal from that ruling.

II. THE CICA DOES NOT GRANT THE GSBCA JURISDICTION TO HEAR A PROTEST REGARDING A PROCUREMENT THAT THE AGENCY DID NOT CONDUCT UNDER THE AUTHORITY OF THE BROOKS ACT

1. GPO Conducted the 600-S Procurement as a Printing Procurement. GPO was established in 1860. See Act of June 23, 1860, 12 Stat. 117 § 1. Congress, finding that "a national printing office" under expert supervision would "produce promptitude, uniformity, accuracy, and elegance," as well as economy, in government printing, provided that all such printing must be done under the direction of the Superintendent of Printing, the statutory predecessor of the Public Printer. See H.R. Rep. No. 249, 36th Cong., 1st Sess., at 3 (1860); 12 Stat. 117 §§ 1, 5. [6] The Supreme Court soon recognized that "the whole subject of public printing" is entrusted to the GPO, subject to the supervision of Congress' Joint Committee on Printing ("JCP"). United States v. Allison, 91 U.S. 303, 304 (1875). See also Doe v. McMillan, 412 U.S. 306, 322-23 (1973); Davis v. United States, 59 Ct. Cl. 197, 198 (1924); In re The Daily Sentinel, B-195566 (Comp. Gen. 1980).

Thus, 44 U.S.C. § 501 provides that "[a]ll printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government * * * ," shall be done at GPO under the supervision of the JCP, subject to exceptions approved by the JCP. Further, 44 U.S.C. § 502 provides that public printing that GPO is not able or equipped to do may be done elsewhere under contracts made by GPO with the approval of the JCP. In addition, 44 U.S.C. § 504 provides that the JCP may permit the Public Printer to authorize another agency to purchase the printing services it needs directly if the Public Printer determines that to be in the best interests of the Government. Under these provisions, departments and agencies of the Government (save the Supreme Court) have no discretion and must have their printing done by GPO or through printing contracts that GPO lets, unless GPO and the JCP grant them approval to purchase printing services directly. Davis v. United States, supra; In re The Daily Sentinel, supra. Thus GPO has exclusive authority within the Federal Government over the production of printing within the Government and the production of public printing outside the Government, subject only to the supervision of the JCP.

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[6] In 1876, Congress abolished the position of Superintendent of Printing, and replaced it with the position of Public Printer. See Act of July 31, 1876, 19 Stat. 105.

Pursuant to this statutory scheme, the Public Printer issued RFP No. 600-S for integrated publishing services and awarded the 600-S contract to EDS. There is no dispute, nor could there be, that it was pursuant to this authority that the procurement was conducted. Equally clear, all the protesters were on notice that this procurement was not being conducted as a procurement of general purpose ADPE subject to the Brooks Act. Thus, GPO's commencement of the procurement through an advertisement in the October 16, 1984 Commerce Business Daily did not contain the required code for an ADP procurement. See 48 C.F.R.

§ 5.207 (1985). Rather, it was advertised solely as a printing procurement. If there was any doubt on the question, the competitors or anyone else interested could have checked with GPO itself or with GSA, since copies of all delegations of procurement authority under the Brooks Act are available for inspection at the GSA Central Office. 46 Fed. Reg. 26178 (1981). In short, it has always been a matter of public knowledge that this procurement was not conducted under the Brooks Act pursuant to a delegation of procurement authority from the GSA. Had anyone deemed that improper, relief could have been sought through GSA, which could have placed the matter before OMB, or by the protesters themselves in GAO or in court. No one pursued any of these courses during the entire course of this lengthy procurement.

After the contract was awarded to EDS, however, Xerox and Volt filed protests with the GSBCA, asserting that that Board had jurisdiction on the ground that the 602-S procurement was for ADP equipment or services and *should* have been conducted pursuant to the Brooks Act. But GSBCA's jurisdiction is strictly limited to complaints concerning procurements that *were* conducted under the authority of the Brooks Act, either by GSA or by other agencies that have received a delegation of procurement authority from the GSA. The language and legislative history of Section 2713 of the CICA make this conclusion inescapable.

2. *The Text of CICA.* Several provisions of Section 2713 (now 40 U.S.C.A. § 759(h)) make clear that the GSBCA's bid protest jurisdiction is limited to procurements conducted by a

procuring agency under the authority of the Brooks Act. We address them in the sequence in which they appear in the statute.

First, 40 U.S.C.A. § 759(h)(1) states that "[u]pon request of an interested party in connection with any procurement conducted under the authority of this section (including procurements conducted under delegations of procurement authority), the board of contract appeals of the General Services Administration * * * shall review any decision by a contracting officer alleged to violate a statute or regulation." 98 Stat. 1182, 40 U.S.C.A. § 759(h)(1) (emphasis added). As the Board itself has stated, "section 2713 of the CICA amends the Brooks Act." Amdahl Corp., GSBCA No. 7859-P, 85-2 BCA ¶ 18,111, modified, 85-3 BCA ¶ 18,221 (1985), appeal filed, No. 85-2760 (Fed. Cir. 1985). Hence the language quoted above means that the Board has jurisdiction only over procurements conducted under the authority of the Brooks Act. No one has ever contended that the procurement at issue here was conducted under the Brooks Act, and it was not. Instead, the GSBCA ignored this statutory limitation on its jurisdiction, apparently hoping the words would go away. But a statute's words must be construed and not ignored. C. Sands and N. Singer, 2A Sutherland Statutory Construction § 46.06 at 104 (4th ed. 1984). And the only possible construction of "conducted under" prevents any protester from bringing this particular procurement, which was not conducted under a DPA, before the GSBCA.

Second, 40 U.S.C.A. §§ 759(h)(2) and (3) deal with pre-award and post-award suspension hearings and provide standards for the GSBCA's suspension of "the procurement authority of the

Administrator or the Administrator's delegation of procurement authority for the challenged procurement . . ." These provisions have no meaning in a case like the present where the procurement was conducted neither by GSA nor by another agency pursuant to a delegation of procurement authority. There was no such Brooks Act procurement authority to suspend. Nonetheless, the Board reached out and ordered the suspension of the contract and enjoined the Army and GPO from satisfying in other ways any of the printing requirements that could have been performed under the contract. The Board thus grossly exceeded its interim suspension authority.

The narrowly tailored scope of the statutory provisions granting the GSBCA interim suspension authority is in marked contrast to the CICA's stay provisions applicable to bid protests filed with the GAO, which provide that the award or performance of the contract shall be stayed during the pendency of the GAO protest unless the head of the procuring authority makes certain findings. 98 Stat. 1200-01, 31 U.S.C.A. §§ 3553(c) and (d). This further confirms that, if the Congress had wished to give the GSBCA roving jurisdiction to suspend contracts not issued pursuant to the Brooks Act, it would have done so expressly.

Third, and perhaps most telling, the scope of the ultimate remedial authority of the Board conferred by Section 2713 demonstrates the Board's lack of jurisdiction over procurements, such as the present one, that were not conducted under the authority of the Brooks Act. 40 U.S.C.A. § 759(h)(5)(B) provides that, if the Board determines that a violation has occurred, "the

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board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement." See also 40 U.S.C.A. § 759(h)(6)(B). Once again, the statutorily prescribed remedies would be meaningless in the present case. There is no Brooks Act procurement authority to "suspend, revoke or revise," since the procurement was conducted pursuant to the Public Printer's authority to let contracts for printing services. Thus no statutorily authorized remedy could be afforded by the Board.

Finally, 40 U.S.C.A. § 759(h)(6)(C) provides that "the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section [i.e., the Brooks Act]." This reiterates a conclusion that we believe leaps from the face of Section 2713: the Board's protest jurisdiction applies only to procurements conducted under the authority of the Brooks Act, not to procurements that protesters claim should have been conducted pursuant to the Brooks Act. This reading of CICA comports fully with the rest of the Brooks Act in that, as we show in Part III below, disputes among federal agencies as to whether a procurement should be under the Brooks Act are expressly committed to OMB, not the Board, for resolution. 7/

7/ As we also show in Part III, the legislative history of CICA makes clear that Congress did not intend the new grant of bid protest jurisdiction to the GSBCA to affect OMB's inter-agency dispute resolution authority under the Brooks Act. See p. 29 infra.

3. *The Legislative History of CICA*. While the language of Section 2713 on this jurisdictional point is sufficiently clear to make unnecessary any resort to the provision's legislative history, that history fully confirms the plain meaning of the text. This amendment to the Brooks Act originated in the House; the Senate-passed bill contained no comparable provision. The Report of the House Committee on Government Operations, submitted by Representative Brooks, described the bill as establishing this Board's jurisdiction "for resolving vendors' complaints concerning procurements *conducted* under Section 111 of the Federal Property and Administrative Services Act of 1949 (the Brooks Act, P.L. 89-306)." H.R. Rep. No. 98-1157, 98th Cong., 2d Sess., at 25 (1984) (emphasis added). The Committee explains the Board's interim suspension and ultimate remedial authority in terms consistent with the enacted language. *Id.* at 26.

The Conference Committee on the CICA accepted the House bill establishing a limited bid protest jurisdiction in this Board. The Conference Report makes clear in several passages that "[t]his provision applies only to those automated data processing procurements *conducted* under the Brooks Act." H.R. Rep. No. 98-861, 98th Cong., 2d Sess., at 1430 (1984).

In sum, the language and legislative history of the CICA show that the GSBCA has clearly exceeded its jurisdiction by taking jurisdiction over a challenge to a procurement that was concededly not conducted under the Brooks Act.

4. **The Board's Rationale**. Without addressing the statutory language of CICA or its legislative history, GSBCA found jurisdiction to exist for two reasons. First, the Board relied on the principle that a court must have jurisdiction to determine its own jurisdiction. App. H at 45. Second, the Board stated that, since the Brooks Act gives the GSA Administrator government-wide authority over automatic data processing equipment procurements, the GSBCA must have authority to police agency failures to obtain a required delegation of procurement authority for an ADP procurement from the GSA Administrator. Id. at 46.

The short answer is that neither reason finds any basis in the GSBCA's statutory grant of jurisdiction. As a forum established by Congress under Article I, the Board's jurisdiction is strictly limited to matters entrusted to it. See Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 452 (1977).

Moreover, while the Board may decide whether a protest falls within its jurisdiction under Section 2713 of the CICA, that principle simply does not support the Board's assumption of jurisdiction here. Section 2713 does not grant the Board jurisdiction to review a procurement that the procuring agency did not conduct under the Brooks Act. Once the Board determines that a procurement was neither conducted by GSA nor pursuant to a delegation of procurement authority from GSA, it must conclude that it has no jurisdiction.

The Board stated that this conclusion would be anomalous, that its authority must be coextensive with that of the GSA Administrator under the Brooks Act. But the question is not whether the GSA Administrator's authority under the Brooks Act is fully enforceable. It is. The question is who decides whether a procurement not conducted pursuant to the Brooks Act should have been so conducted. The Board's jurisdiction is confined by the CICA to cases where the procurement authority of the GSA has been invoked and the procurement has been conducted thereunder. Other forums resolve disputes as to whether a procurement is subject to the Brooks Act.

OMB is charged with determining the Government's position regarding the applicability of the Brooks Act, and offerors in a procurement could encourage GSA to institute the OMB interagency dispute resolution process. Moreover, offerors on their own have adequate forums in which to assert their claim that an agency unlawfully failed to obtain a DPA and conduct a procurement under the Brooks Act. GAO entertains such claims. Indeed, the GAO recently held that the Navy violated the Brooks Act by failing to get a DPA. Plus Pendetur Corp., Network Systems Corp., B-220087, B-220872 (Jan. 30, 1986). Furthermore, the federal district courts have jurisdiction over post-award bid protests, including the claim that the procuring agency has violated the Brooks Act. In fact, CICA expressly preserves these rights in 40 U.S.C.A. § 759(h)(6)(C). But the Board's assumption that it must decide whether GPO should have obtained a DPA flies in the face of the statutory text of the CICA and its legislative history.

III. OMB IS CHARGED WITH DETERMINING THE GOVERNMENT'S POSITION ON BROOKS ACT DISPUTES AND ITS IMMINENT DETERMINATION REGARDING WHETHER THE CHALLENGED PROCUREMENT IS SUBJECT TO THE BROOKS ACT WILL BIND GSBCA

The Board's insistence upon taking jurisdiction over a protest challenging a procurement that the procuring agency did not conduct under the authority of the Brooks Act is not only flatly contrary to the text of Section 2713 of CICA, it is also inconsistent with OMB's statutory responsibility for determining the Government's position on the applicability of the Brooks Act. From its inception, the Brooks Act has contemplated that the Office of Management and Budget would resolve conflicts between GSA determinations under the Brooks Acts and affected agencies. 40 U.S.C. § 759(g) in pertinent part states:

> "The Administrator [of GSA] shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Office of Management and Budget unless the President otherwise directs."

This authority to resolve inter-agency disputes under the Brooks Act plainly encompasses the authority to resolve a disagreement between a procuring agency and the GSA as to whether a procurement is subject to the Brooks Act. Indeed, in 1976 OMB ruled that an inter-agency disagreement as to whether a procurement is subject to the Brooks Act "is a disagreement susceptible of resolution by OMB pursuant to Section 111(g) [40 U.S.C. § 759(g)] authority." Letter of December 9, 1976, from OMB Deputy Director Paul H. O'Neill to GSA Administrator Jack Eckerd, App. P. In that ruling, OMB explained that its resolution of such disputes involves both the issue of statutory interpretation and, to the extent consistent with congressional intent, review of the question from a current fiscal and policy perspective. See App. P at 86-87.

Under the Brooks Act, the GSA has broad authority "to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies." 40 U.S.C. § 759(a). But OMB, as the representative of the President and the foremost government authority on fiscal matters, has express and broad supervisory authority over GSA's administration of the Brooks Act. Thus, 40 U.S.C. § 759(g) not only grants OMB, subject to direction by the President, authority to conclusively resolve inter-agency disputes, it also provides that the "authority conferred upon" the GSA by the Brooks Act "shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget." In short, it is clear that GSA, in exercising its authority under the Brooks Act, is subject to the control of OMB and the President. [8] Equally clear, the GSBCA, as a part of GSA, is bound by OMB's determinations.

OMB will soon decide whether the 600-S procurement was subject to the Brooks Act. Once GPO learned in the course of the GSBCA proceeding that GSA disagreed with GPO regarding the applicability of the Brooks Act to the 600-S procurement, GPO wrote to the OMB asking it to exercise its inter-agency dispute resolution authority under the Brooks Act. App. E. OMB assumed jurisdiction and has advised GPO and GSA that it expects to make a ruling not later than March 4, 1986. App. G. But without waiting for OMB, the GSBCA determined to suspend the 600-S contract, to preclude GPO from doing much of the Army's necessary printing any other way, and to subject GPO to extensive discovery and to a hearing on the merits. This Court must act to confine the GSBCA to its lawful jurisdiction and to preserve OMB's statutorily specified role as arbiter of inter-agency disputes regarding the applicability of the Brooks Act.

If OMB rules that the 600-S procurement is not subject to the Brooks Act, that determination must be respected by the

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[8] The legislative history of the Brooks Act makes clear that the authority conferred on GSA by the Act "shall be exercised subject to direction by the President and by the Bureau of the Budget [now OMB]." S. Rep. No. 938, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 3859, 3895. The legislative history also consistently recognizes OMB's broad authority to resolve all disagreements between procuring agencies and GSA. Thus the Senate Report states: "the bill maintains BOB's traditional control over fiscal and policy matters. *Action by any agency under this legislation would be subject either to approval or review by BOB.*" *Id.* at 3861 (emphasis added).

Board. In that situation, the Board would not only be proceeding to decide a question that the CICA does not authorize it to decide, it would be flouting a determination of the OMB that by statute is to be conclusive on the Government (apart from the federal courts).

The GSBCA is a board of contract appeals reconstituted pursuant to the Contract Disputes Act of 1978, Pub. L. No. 95-563. That statute provides that the boards are to be established "*within* an executive agency." 41 U.S.C. § 607(a) (emphasis added). The Board's judges are appointed by the Administrator of GSA. See 41 U.S.C. § 607(b); 5 U.S.C. § 3105; 40 U.S.C. § 758. Thus, there is no doubt that the General Services Administration Board of Contract Appeals is a part of the General Services Administration and a part of the Executive Branch.

The Board apparently thought that CICA exempted it from being bound by an OMB determination under 40 U.S.C. § 759(g). Such a contention cannot withstand analysis. In the first place, had Congress intended to modify OMB's role and give GSBCA the final word within the Executive Branch as to the applicability of the Brooks Act in the face of an inter-agency dispute, that intent would have been expressed in the language and legislative history of CICA. Such a modification cannot otherwise be inferred. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 550 (1978). In fact, Congress had the opposite intent. The House Report states that "*[w]ith regard to OMB's authorities under the Brooks Act, the bill does not alter the current procedures for resolving conflicts between procuring* agencies and GSA's procurement office . . . ." H.R. Rep. No. 98-1157, supra at 27 (emphasis added). Thus, the Committee indicated its understanding that inter-agency jurisdictional disputes would be resolved by OMB and that the binding effect of an OMB determination within the Government would not be affected by CICA. Furthermore, as shown in Part II, supra, the GSBCA's grant of bid protest jurisdiction plainly does not encompass overturning the determination of a procuring agency that a procurement is not subject to the Brooks Act.

As the District Court recognized in issuing a temporary restraining order (App. A), immediate injunctive relief is necessary to preserve OMB's statutory decisional role. 9/ If OMB rules that the 600-S procurement is not subject to the Brooks Act, this Court should issue the writ to enforce the binding effect of OMB's determination on the GSBCA.

IV. THE CONTRACT AT ISSUE IS PAID FOR FROM GPO'S REVOLVING FUND AND IT IS ACCORDINGLY EXPRESSLY EXEMPTED FROM THE BROOKS ACT BY PUBLIC LAW 94-440

As noted earlier, shortly after the creation of the GPO, the United States Supreme Court recognized that "the whole subject of public printing" is entrusted to the GPO, subject to the supervision of the Joint Committee on Printing of the Congress. United States v. Allison, 91 U.S. 303, 304 (1875). The sweeping authority afforded the GPO is fully reflected in

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9/ The Court justified the issuance of the TRO in part on the ground that it was necessary "to prevent OMB's ruling from being a nullity," App. A at 4 n.2.

GPO's governing legislation. That legislation makes clear that "[a]ll printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government * * *", shall be done at GPO or through contracts let by GPO under supervision of the JCP, subject only to exceptions approved by the JCP. 44 U.S.C. §§ 501-502.

This plenary government-wide responsibility of the GPO led the Congress in 1953 to release GPO from the stricture of funding by yearly appropriation. In congressional hearings that year, the Comptroller of the GPO explained the impracticalities of the GPO's appropriation being "cut off at the end of each year, and * * * start[ing] again the succeeding year with a new appropriation. * * * [It is] necessary for us to change to a revolving fund, which is a continuing appropriation." _Legislative-Judiciary Appropriations for 1954: Hearings Before the Subcommittee of the House Committee on Appropriations_, 83d Cong., 1st Sess., at 135 (1953) ("_1953 Hearings_") (statement of Felix E. Cristofane, GPO Comptroller). Accordingly, Congress made "the operation and maintenance" of the GPO subject to a statutorily created "revolving fund," which "is available without fiscal year limitation." 44 U.S.C. § 309. 10/

10/ The revolving fund was established primarily to cover GPO's expenses for the printing of agencies other than Congress, and to facilitate "business-type" accounting for these transactions. See _1953 Hearings_, _supra_, at 135-36. Under the scheme created by the 1953 legislation, GPO pays for other agencies' printing with (FOOTNOTE CONTINUED)

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The Brooks Act, 40 U.S.C. § 759, was enacted in 1965 to provide the General Services Administration with authority to procure "all general purpose ADPE used by Federal agencies." 47 Comp. Gen. 275, 277 (1967). The Brooks Act is an amendment to the Federal Property and Administrative Services Act of 1949, an act which provided for a system of centralized purchasing for the federal government. 63 Stat. 377 (1949). The JCP was exempted from the provisions of the Property Act generally, see 40 U.S.C. § 474(18), and GPO was specifically exempted with respect to appropriated funds of the GPO. 44 U.S.C. § 311. The Brooks Act confined many agencies' general exemptions from the Property Act, including that of the JCP, to non-ADPE procurements. 40 U.S.C. § 759(e). The specific exemption for appropriated funds of the GPO was not so confined, however.

In this context there was some uncertainty as to whether the Brooks Act applied to GPO. The Comptroller General concluded in a January 10, 1969, opinion to the GSA Administrator that the Brooks Act should be read broadly to bring GPO ADPE procurements within the confines of the GSA regulatory system. No. B-151204, 48 Comp. Gen. 462 (1969). This case involved the acquisition of punched cards and tabulating paper to be used "virtually exclusively with ADPE." Id. at 463. It did not involve the acquisition of printing, the subject matter within the exclusive purview of GPO.

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revolving fund money, and is subsequently reimbursed by the client agencies. See Legislative Branch Appropriations for Fiscal Year 1978, Part 2: Hearings Before a Subcommittee of the Senate Committee on Appropriations, 95th Cong., 1st Sess., at 406 (1977).

Early in 1976, to avoid any dispute over whether the Brooks Act applied to printing acquisitions and faced with an increasing need to employ computerized printing equipment and services, the Public Printer successfully sought legislative relief from the possible extension of the Brooks Act to GPO's printing procurements. The Public Printer explained to the House Appropriations Committee that the Brooks Act was "designed to give [GSA] control over [ADP] throughout the Federal Government. Just recently, however, it became apparent that this control could be, and in some instances has been, applied to what we consider to be printing equipment." _Legislative Branch Appropriations for 1977: Hearings before a Subcommittee of the House Committee on Appropriations_, 94th Cong., 2d Sess., at 555 (1976) (statement of Thomas F. McCormick, Public Printer). In this regard, the Public Printer specifically noted that "the new typesetting system that we recently installed includes several self-standing computers and technically the control of that type of equipment, which is solely for the purpose of automatic typesetting, _could be construed_ to be a part of this provision of law and we would have to get GSA's approval to purchase it." _Id_. (emphasis added.) In response to this request for a Brooks Act exemption, Congress provided as follows in the Legislative Branch Appropriation Act of 1977, Public Law 94-440:

> "The Government Printing Office is hereby authorized to make such expenditures, within the limits of funds available and in accord with the law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation

> Control Act, as amended, as may be necessary in carrying out the programs and purposes set forth in the budget for the current fiscal year for the 'Government Printing Office revolving fund': *Provided*, That not to exceed $3,500 may be expended on the certification of the Public Printer in connection with special studies of governmental printing, binding, and distribution practices and procedures: *Provided further*, That during the current fiscal year the revolving fund shall be available for the hire of two passenger motor vehicles and the purchase of one passenger motor vehicle: *Provided further, That funds available to the Government Printing Office may be expended to purchase, lease, maintain and otherwise acquire automatic data processing equipment without regard to the provisions of 40 U.S.C. 759*: *Provided further*, That funds available to the Government Printing Office may be expended to maintain, repair, purchase, lease, and otherwise acquire any motor vehicle without regard to the provision of 31 U.S.C. 638a." 90 Stat. 1460 (emphasis added).

The underscored provision thus exempted GPO from the Brooks Act. The GSBCA held, however, that this exemption expired in Fiscal Year 1977 because: (1) the exemption relates back and is limited to fiscal year 1977 "programs and purposes"; (2) the law contains no "words of futurity" indicating its permanence; and (3) the Congress deleted the exemption the following year. 11/

11/ The Board's opinion also relies on a letter, dated January 30, 1986, to the Administrator of GSA and the Public Printer, from the Chairmen of the House Committee on Government Operations and the Joint Committee on Printing. Slip op. at 6, 7, 12. That letter noted that there has been confusion concerning procurements incorporating both printing and general ADPE. The letter stated that printing procurements should be conducted by GPO, but that if such procurements incorporate general ADP features they also should be conducted in accordance with the Brooks Act. The letter further indicated that if a purchasing agency is unsure how to proceed, it should seek the guidance of GSA, GPC, the Government Operations Committee, and the Joint Committee on Printing.
(FOOTNOTE CONTINUED)

As shown below, GSBCA misread the language of Pub. L. 94-440 and its relevant legislative history.

1. *The Statutory Language*. It cannot be disputed that the language of the proviso creating GPO's Brooks Act exemption is not by its terms limited to Fiscal Year 1977. The absence of a fiscal year limitation in this proviso stands in stark contrast to the inclusion of a fiscal year limitation in the immediately preceding proviso in Public Law 94-440 granting the GPO authority to hire two motor vehicles and purchase one. 90 Stat. 1460. Furthermore, the absence of any fiscal year limitation in the Brooks Act exemption is particularly significant because the proviso granting that exemption appears in the section of Public Law 94-440 dealing with GPO's Revolving Fund, which provides funds to GPO without regard to fiscal year limitations. It simply makes no sense to read the proviso granting the Brooks Act exemption as more limited than the Revolving Fund. As the Comptroller General held in *National Railroad Passenger Corp.*, B-208705 (1982), where a proviso "appears in connection with a

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The Board's reliance on this letter was misplaced. First, the letter was not intended to express a legal opinion or to affect the protests or this litigation; it was intended to provide guidance to agencies for the future. Second, the advice was limited to procurements involving *general* purpose ADPE, which is not the case here. Third, even if the letter could be construed as an expression of a legal opinion, the Board should have recognized that the post-hoc expressions of Committee Chairmen regarding the meaning of earlier legislation are not entitled to any weight. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980). Finally, it should be noted that the positions taken by GPO before the Board and this Court are made with the full knowledge and support of the JCP.

no-year appropriation * * *, its effect may continue beyond the end of the fiscal year, * * * so long as the funds provided remain available." Id. at 2. The last time that Congress appropriated additional funds for GPO's Revolving Fund was in Fiscal Year 1975. Pub. L. 93-371, 88 Stat. 442 (1974).

The Board seized upon language in the general authorization provision of Public Law 94-440 and ruled that GPO's Brooks Act exemption has expired because the "programs and purposes" set forth in the Fiscal Year 1977 budget for the Government Printing Office revolving fund must not have included the 600-S procurement. That argument misconstrues the "programs and purposes" language.

What information Congress had about the GPO's expected Revolving Fund expenditures and revenues for Fiscal Year 1977 (and FY 1976) was contained in the Budget Schedule for the GPO Revolving Fund for Fiscal Year 1977. Legislative Branch Appropriations for 1977: Hearings before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., at 554 (1976). That Budget Schedule contained estimates of the Revolving Fund's total outlays and revenues, as well as a breakdown of these estimated totals into several broad classifications. It did not, however, identify individual procurements. Indeed, the classifications used were not peculiar to the Fiscal Year 1977 Budget Schedule. Compare Legislative Branch Appropriations for 1978: Hearings before a Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess., at 495 (1977). Nor did GPO provide such information to the House Subcommittee elsewhere.

The GPO did not seek, and Congress did not offer, authorization of the dollar amounts stated in the estimates. As the Comptroller of GPO explained in an affidavit filed with the Board, GPO may exceed the amounts stated in its estimates without consequence.

Thus, the Board's ruling that the Brooks Act exemption created by Public Law 94-440 is limited to contracts contained in specific programs and purposes embodied in the Fiscal Year 1977 budget rests on the false assumption that such contracts or programs are listed somewhere within the 1977 Appropriations Act or its legislative history. Such specifically identified programs or contracts are not in those materials. Instead, this broad "programs and purposes" language refers to, and has always been understood by Congress and GPO to refer to, the GPO's general mandate to do the printing and binding of the United States government and to maintain its own operations incident thereto. A procurement of printing such as the 600-S contract falls within the "programs and purposes" of the Revolving Fund budget for Fiscal Year 1977 or any other year. The programs and purposes language prohibits GPO from making Revolving Fund expenditures for things other than printing, binding, and its own operational needs incident to printing and binding, unless it obtains the express authorization of Congress. It does not, however, tie the exemption created in Public Law 94-440 to specific Fiscal Year 1977 projects and programs that were never identified for Congress.

Further, the Board simply errgd in suggesting that the Brooks Act exemption could not survive Fiscal Year 1977 absent words of futurity such as "hereafter." When the continuing effect of a substantive measure of an appropriations act is in dispute, "[t]he real issue is whether Congress intended the provision to have permanent application * * *." Roccaforte v. Mulcahey, 169 F. Supp. 360, 363 (D. Mass.), aff'd, 262 F.2d 957 (1st Cir. 1958). When the continuing effect of a substantive provision of an appropriations act is at issue, "[t]he whole question depends on the intention of Congress." United States v. Will, 449 U.S. 200, 222 (1980) (citations omitted). While inclusion of words of futurity in an enactment may be sufficient evidence of legislative intent, it is certainly not necessary evidence. See, e.g., United States v. Welden, 377 U.S. 95, 96-97 (1964). Such words were not necessary because the revolving fund is a continuing, no-year appropriation and because where Congress intended to limit certain provisions involving the revolving fund to a particular fiscal year, it did so expressly.

2. The Legislative History. The legislative history of Public Law 94-440 also indicates that it was intended as a permanent measure. The House Committee on Appropriations Report on Public Law 94-440 enumerates GPO's Brooks Act exemption as a "legislative provision." H.R. Rep. No. 94-1225, 94th Cong., 2d Sess., at 38, 42 (1976). The Report explains that

> "The Committee has approved language, as requested, exempting the Government Printing Office from the provisions of 40 U.S.C. 759 which require that the purchase, lease, and maintenance of automatic data processing

> equipment be accomplished through the General Services Administration. The Public Printer advised the Committee that since the General Services Administration has expanded the scope of the law to permit [its] control to include the acquisition of printing equipment, and in some cases, printed products, the Government Printing Office has suffered delays and extra costs as a result of being under [the Brooks] Act." Id. at 31.

There is nothing in this language, or elsewhere in the legislative history of Public Law 94-440 (see Legislative Branch Appropriations for Fiscal Year 1977: Hearings Before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 2d Sess., at 609 (1976)), suggesting that the GPO's problem with unnecessary delays and costs due to GSA's intervention in GPO procurements was limited only to Fiscal Year 1977, or that Congress intended to remedy these problems only during Fiscal Year 1977. Indeed, it cannot be plausibly maintained that Congress would condemn waste of government resources in one year, and countenance it the next. Yet this is the necessary implication of the GSBCA's ruling that the Brooks Act exemption was granted for 1977 and expired in 1978.

In addition, Congress underscored its intention to effect a permanent change in the law by describing GPO's Brooks Act exemption at a "legislative provision" and as a "change in existing law" in the House Report. H.R. Rep. No. 94-1225, 94th Cong., 2d Sess. at 36, 42 (1976).

Recognizing that it had granted GPO a permanent exemption from the Brooks Act, the House Committee directed that, in exercising its authority under the exemption, "the Government

Printing Office adhere to the same limitations of cost as are imposed by the Administrator of the General Services Administration under [the Brooks Act]." Id. at 31.

Furthermore, it is highly instructive that GPO's Brooks Act exemption in Public Law 94-440 was immediately followed in that law by another exemption (from 31 U.S.C. § 638a) authorizing GPO to purchase and lease motor vehicles without going through the GSA. The House Report specifically noted this motor vehicle exemption (which is phrased in the identical manner as the Brooks Act exemption) was designed to "clarify existing law with regard to the Legislative Branch as it applies to the Government Printing Office." H.R. Rep. No. 94-1225, 94th Cong., 2d Sess. at 42. There can be no doubt that this "clarifying" exemption was intended to be permanent.

The next year the Public Printer mistakenly proposed that both the Brooks Act exemption and the motor vehicle exemption be repeated in the 1978 appropriations legislation and that the word "hereafter" should be included to make unmistakeable the permanence of the exemptions. But the House Committee, in explaining the provisions of the final bill, recommended the deletion of this unnecessary reiteration of these permanent exemptions, noting that "[b]oth exemptions were carried in the 1977 bill." H.R. Rep. No. 95-450 ("House Report"), 95th Cong., 1st Sess. at 36 (1977). 12/ The only possible interpretation of

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12/ It is clear that what Congress deleted was the exemption language suggested by the Public Printer that had been included in the draft Fiscal Year 1978 House Appropriations bill, and not the (FOOTNOTE CONTINUED)

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this statement is that, in the view of the House Committee, the exemption was already in the law. Thus, the Brooks Act exemption was not repeated in the Fiscal Year 1978 appropriations legislation precisely because the exemption (like the unquestionably permanent exemption from going through GSA to purchase motor vehicles) was already contained in the 1977 legislation.

There is considerable further evidence that Congress understands the Brooks Act exemption enacted in Fiscal Year 1977 to have continuing effect. For example, in Fiscal Year 1978 when either house of Congress desired amendments to Public Law 94-440, it explicitly proposed them in the "Changes in Existing Law" section of its Report. See, e.g., House Report at 42, 43 (amending provisions of Pub. L. 94-440 relating to the Office of Technology Assessment and the Architect of the Capitol). Neither Report proposed amending the exemptive provision of Pub. L. 94-440, and no change to that continuing legislative language was made. See S. Rep. No. 95-338, 95th Cong., 1st Sess. (1977); House Report at 42-46. This is in stark contrast to the Committee Reports accompanying Public Law 94-440 which expressly noted the GPO Brooks Act exemption as a "Change[] in Existing Law." Moreover, there has been no other subsequent appropriations measure that has repealed GPO's Brooks Act exemption.

Finally, the Comptroller General has already recognized the permanance of GPO's exemption from the Brooks Act. In Memorex Corp., 57 Comp. Gen. 865 (1978), the Comptroller General

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exemption proviso of Public Law 94-440. See Legislative Branch Appropriation Bill for 1978, Subcommittee Print, at 185 (1977).

found that Public Law 94-440 exempted GPO from the Brooks Act with respect to contracts that were awarded in Fiscal Year 1978 and that were to be performed over a two-year period. Contrary to the Board's suggestion, the procurement in Memorex was no more tied to specific Fiscal Year 1977 "programs and purposes" than is the 600-S procurement.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, petitioner requests this Court to issue an order

(1) declaring that OMB has exclusive jurisdiction under 40 U.S.C. § 759(g) to resolve inter-agency disputes arising under the Brooks Act and that any OMB resolution of such a dispute is binding upon respondents;

(2) declaring that the respondent GSBCA has no jurisdiction over the Protests of Xerox Corporation/Volt Information Sciences, Inc., Solicitation No. RFP 600-S, GSBCA No. 8333-P and 8336-P;

(3) prohibiting the respondent GSBCA, its officers, agents, employees, and all persons acting by, through, or for them, or on their behalf, from (a) asserting jurisdiction over the aforementioned protests; (b) scheduling or holding a hearing on any aspects of those protests; (c) requiring or authorizing discovery relating to any aspects of those protests; (d) suspending the performance of the GPO contract which resulted from procurement No. 600-S; and (e) asserting jurisdiction over future GPO procurements; and

(4) compelling the respondent GSBCA to dismiss the proceeding at issue forthwith and to vacate all of its orders, with the exception of the protective orders it has entered regarding documents filed with it.

Respectfully submitted,

Grant G. Moy, Jr.

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Government Printing Office

Dated: February 28, 1986

* Counsel of Record

APPENDIX 16.—COUNSEL FOR U.S. GOVERNMENT PRINTING OFFICE, APPENDIX TO THE U.S. GOVERNMENT PRINTING OFFICE'S EMERGENCY PETITION FOR WRIT OF MANDAMUS TO THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS AND THE GENERAL SERVICES ADMINISTRATION, FEBRUARY 28, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. ______

IN RE: UNITED STATES GOVERNMENT PRINTING OFFICE,

Petitioner

APPENDIX TO THE UNITED STATES GOVERNMENT PRINTING OFFICE'S
EMERGENCY PETITION FOR WRIT OF MANDAMUS TO THE
GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT
APPEALS AND THE GENERAL SERVICES ADMINISTRATION

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Counsel for United States
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Dated: February 28, 1986

* Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION,

Plaintiff

v.

GENERAL SERVICES ADMINISTRATION, et al.,

Defendants

Civil Action No. 86-0353

FILED
FEB 19 1986
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM OPINION

This case raises several challenges to the General Services Administration's ("GSA") role under the Brooks Act, 40 U.S.C. § 759, in overseeing certain contracts awarded by the Government Printing Office ("GPO"). Plaintiff Electronic Data Systems (EDS) was awarded GPO's contract for Army printing. Disappointed offerors Xerox, Volt and AT&T sought review of the award before the General Services Administration Board of Contract Appeals ("GSBCA"). EDS' motion to dismiss the GSBCA proceedings for lack of jurisdiction was denied on February 4, 1986. The GSBCA found preliminarily that (1) GPO is subject to the Brooks Act, (2) GSBCA has jurisdiction over a contract award challenge, even though the contract was not conducted under the direct or delegated procurement authority of GSA, and (3) the Office of Management & Budget's ("OMB") jurisdiction to resolve inter-agency disputes under the Brooks Act does not divest the GSBCA of jurisdiction to determine whether a particular contract is for automatic data processing equipment ("ADPE") and hence within the Brooks Act. The GSBCA then suspended performance of the Army printing contract, pending its final hearing on the merits. On February 3, 1986, EDS wrote to OMB, requesting a determination as to whether the contract in issue was for ADPE. OMB has stated that it will render a decision no later than March 4th.

EDS seeks declaratory and injunctive relief, claiming that the GSBCA's exercise of jurisdiction over GPO and its suspension of this contract under the Brooks Act are unlawful. EDS' original application for a temporary restraining order was denied without prejudice on February 7, 1986, and Xerox, Volt and AT&T were given leave to intervene as defendants. GPO was granted leave to enter as amicus. The case is presently before the Court on plaintiff's renewed application for a temporary restraining order, GPO's motion to intervene as plaintiff, and the Army's motion to intervene as defendant.1/ Upon consideration of the supporting and opposing memoranda, and lengthy oral argument of counsel, and after a thorough review of the record in this matter, the Court concludes that a temporary restraining order should issue, and that the motions to intervene under Rule 24(a) should be denied.

1/ Defendant GSA's Motion to Transfer is presently under advisement; the Court's ruling will be issued shortly.

Temporary Restraining Order

To determine whether a temporary restraining order should issue in this case, the Court must consider (1) the plaintiff's likelihood of prevailing on the merits, (2) whether plaintiff will suffer irreparable injury absent preliminary relief, (3) the possible harm to other interested parties if injunctive relief is granted, and (4) wherein lies the public interest. Virginia Petroleum Jobbers Assoc. v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958). In the context of the limited purpose of a temporary restraining order, the Court's analysis of these factors seeks principally to ensure preservation of the status quo. See generally Enercons Virginia, Inc. v. American Security Bank, 720 F.2d 28, 29 (D.C. Cir. 1983) (temporary injunctive relief beyond preservation of status quo improper at preliminary stage).

The facts relevant to this inquiry have been amplified by the recent affidavits filed by the defendant GSA, and by further argument of counsel. Pursuant to the GSBCA's order, GPO has suspended all printing of Army materials. The ensuing backlog of work which is accruing daily will place a heavy financial burden on GPO once GSBCA's stay is lifted.2/ Further, GPO is required

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2/ Although the stay imposed by the GSBCA can be partially lifted upon a showing that a particular printing need presents "'urgent and compelling circumstances' significantly affecting the interests of the United States," this piecemeal relief would not adequately mitigate the harm to GPO at this juncture. The printing requirements are ongoing, and after careful consideration, the Court feels that it would work substantial harm to GPO to require it to apply to GSBCA for periodic releases, when GSBCA's authority to exercise jurisdiction over to devote considerable time and manpower to respond to the present administrative proceedings. While litigation expenses incurred by parties are not generally viewed as "irreparable injury," see generally FTC v. Standard Oil of California, 449 U.S. 232 (1980), in light of the imminent decision by the OMB which may resolve the challenge to the GSBCA proceedings, the ligitation burden imposed upon GPO appears unduly onerous. In addition, GSA - the original named defendant - has conceded that the injuries borne by GPO warrant some type of temporary injunctive relief. The remaining defendants have articulated as harm only monetary losses which would not be due specifically to any temporary delay in the Board proceedings.

Plaintiff has accordingly met its burden of showing that a restraining order is needed to maintain the status quo. The merits of plaintiff's claims remain to be developed, but they do not appear to the Court to be without basis. Thus, given the balance of the equities in this case, the irreparable injury to the petitioner and amicus, and the fact that a pending OMB procedure may resolve the parties' concerns about the propriety of the GSBCA proceedings in 14 days, the Court concludes that temporary relief is warranted. Therefore, the limitation on GPO and EDS which precludes them from satisfying any of the Army's print-

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the contract is contested. Although plaintiff's challenge to GSBCA's authority does not alone compel relief from the Board's ruling, the ruling from OMB may resolve the challenge. In order to prevent OMB's ruling from being a nullity, and to permit this threshhold dispute to be resolved without unnecessary litigation, the GSBCA proceeding should be stayed to give OMB a chance to rule ing requirements is temporarily lifted for 10 days from the date of this order, or until OMB rules on the EDS inquiry, whichever occurs first and the GSBCA proceeding is temporarily stayed for 10 days or until OMB rules, whichever first occurs.

Motions to Intervene

Both GPO and the Army have moved to intervene as of right under Fed. R. Civ. P. 24(a)(2) based upon their interests in the printing contract at issue, claiming that existing representation does not adequately represent their particular interests. Although no party's views and interests mirror any other's in this action, both the Government and the private parties are well-represented before the Court. GPO presently is an amicus, and its views were thoroughly aired at oral argument. GPO has not demonstrated how the present combination of representation by EDS' counsel and by its own counsel, as amicus, is inadequate.

Similarly, the Army has not demonstrated that the lack of precise parallel among their interests and those represented by the existing defendants rises to "inadequate" representation. Any shortfalls in presentation of the Army's interests can be cured by permitting the Army to enter as amicus.

Thus, the Court concludes that GPO's motion to intervene should be denied, and that the Army should be permitted to file an appearance as amicus. An order consistent with the above conclusions accompanies this Memorandum Opinion.

Thomas F. Hogan

Thomas F. Hogan
United States District Judge

Dated: February 19th, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION,

Plaintiff

v.

GENERAL SERVICES ADMINISTRATION,
et al.,

Defendants

Civil Action No. 86-0353

FILED
FEB 19 1986
CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER

Upon consideration of plaintiff's Application for Temporary Restraining Order, the Motions to Intervene of the Army and the Government Printing Office, defendants' oppositions, the supporting memoranda, affidavits and exhibits, oral argument of counsel and the entire record of this case, and in accordance with the accompanying opinion, it is this 19th day of February, 1986,

ORDERED that

(1) GPO's motion to intervene is denied;

(2) the Army may enter this case as amicus; and

(3) plaintiff's application for temporary restraining order is granted, and the GSBCA's February 6, 1986 suspension of the requirements contract, solicitation number RFP 600-S, issued by GPO for the United States Department of Army is hereby stayed to permit GPO and the Army to satisfy any of the Army's requirements which would be satisfied under the contract. The proceedings before the GSBCA, including discovery, are also temporarily

stayed. This order shall remain in effect for 10 days from the date of this Order or until the Office of Management & Budget issues its decision on plaintiff's request, whichever happens first.

No bond will be required at this time.

4 28 PM
19 Feb. 1986

Th F. Hogan
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 21 1986

JAMES F. DAVEY, Clerk

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION,

Plaintiff

v.

GENERAL SERVICES ADMINISTRATION, et al.,

Defendants

Civil Action No. 86-0353

MEMORANDUM OPINION AND ORDER

This case raises several challenges to the General Services Administration's ("GSA") role under the Brooks Act, 40 U.S.C. § 759, in overseeing certain contracts awarded by the Government Printing Office ("GPO"). Plaintiff Electronic Data Systems (EDS) was awarded GPO's contract for Army printing. Disappointed offerors Xerox, Volt and AT&T sought review of the Award before the General Services Administration Board of Contract Appeals ("GSBCA"). EDS' motion to dismiss the GSBCA proceedings for lack of jurisdiction was denied on February 4, 1986. The GSBCA found preliminarily that (1) GPO is subject to the Brooks Act, (2) the Office of Management & Budget's ("OMB") jurisdiction to resolve inter-agency disputes under the Brooks Act does not divest the GSBCA of jurisdiction to determine whether a particular contract is for automatic data processing equipment ("ADPE") and hence within the Brooks Act, and (3) GSBCA has jurisdiction over this contract award challenge, even though the contract was not conducted under the direct or delegated procurement authority of GSA. The GSBCA then suspended performance of the Army printing contract, pending its final hearing on the merits. On February 3, 1986, EDS wrote to OMB, requesting a determination as to whether the contract in issue was for ADPE. OMB has stated that it will render a decision no later than March 4th.

EDS seeks declaratory and injunctive relief, claiming that the GSBCA's exercise of jurisdiction over GPO and its suspension of this contract under the Brooks Act are unlawful. Xerox, Volt and AT&T were given leave to intervene as defendants and GPO and the Army have been granted leave to enter as amici. On February 20, EDS' renewed application for a temporary restraining order was granted after oral argument. The Court has before it defendants' motion to transfer this case to the United States Court of Appeals for the Federal Circuit. Upon consideration of the supporting and opposing memoranda, and lengthy oral argument of counsel, and after a thorough review of the record in this matter, the Court concludes that the motion to transfer should be granted.

Discussion

GSA contends that this case must be transferred to the Federal Circuit under this Circuit's ruling in Telecommunications Research & Action v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"). In TRAC the Court of Appeals found that it had exclusive jurisdiction over plaintiff's claim of unreasonably delayed agency action, holding that "where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review." 750 F.2d at 72. The potential breadth of application of the literal holding of TRAC has made the case difficult to apply when courts are confronted with claims not based upon agency delays. E.g., Zantop International Airlines, Inc. v. Engen, 601 F. Supp. 667 (D.D.C. 1985). Courts generally have found that suits challenging agency actions must be brought in the Court of Appeals, if the actions at issue would be reviewable along with the class of claims committed to the Court of Appeals' exclusive jurisdiction, even though the specific final agency action contemplated by the statute has not yet occurred. E.g., Oil, Chemical & Atomic Workers Int'l. v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985) (claim of unreasonable delay in agency action); Zantop, 601 F. Supp. at 669 (challenge to alleged modification of FAA certificate). Thus, the nature of plaintiff's claim, standing alone, is not determinative of jurisdiction; once the claim is categorized, the Court must look to the statute to determine where it must be brought. See Ticor Title Insurance Company v. Federal Trade Commission, No. 85-3089, slip op. at 3-4 (D.D.C. Jan. 3, 1986) (Congress' allocation of judicial review determinative, regardless of underlying nature of claim). Congress has clearly mapped out paths along which relief must be sought, and the Court is bound to respect this legislative choice. This Court must therefore scrutinize the applicable jurisdictional statutes to determine the appropriate forum for review of the "class of claims" encompassing the present action.

GSA contends that this case must be transferred to the Federal Circuit because 28 U.S.C. § 1295(a)(10) vests exclusive jurisdiction in the Federal Circuit over a "final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978." The Contract Disputes Act, 41 U.S.C. § 607, et seq., grants authority to establish agency boards of contract appeals and gives the boards jurisdiction over appeals from contracts either made by the particular agency or designated as appealable to the agency's board. 41 U.S.C. § 607(d). Appeals of board decisions must be brought before the Federal Circuit Court of Appeals. 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(10). Under the Contract Disputes Act, the contractor has the initial option to seek relief either from the agency board of contract appeals or from the United States Claims Court. E.g., 41 U.S.C. § 609(a)(1). The two routes of review are mutually exclusive, and only the contractor may choose which path to follow. E.g., Diamond Mfg. Co. v. United States, 3 Cl. Ct. 424 (1983); Tuttle/White Constructors, Inc. v. United States, 656 F.2d 644 (Ct. Cl. 1981).

The defendant intervenors filed for review of GPO's award of the present contract before the GSBCA, pursuant to the Competition in Contracting Act ("CICA"), 40 U.S.C. § 759(h)(1). CICA provides that "interested parties" to ADPE contracts may obtain

GSBCA review of the award, which review is then governed by the Contract Disputes Act.[1] 40 U.S.C. § 759(h)(6)(A). Interested parties also reserve the right to file their claims in District Court or the Court of Claims. 40 U.S.C. § 759(h)(6)(c). Appeals from final decisions of the GSBCA and the Court of Claims are within the exclusive jurisdiction of the Federal Circuit Court of Appeals. 28 U.S.C. § 1295(a)(3), (10). Although alternative forums for review are available at the outset, a protestor locks in an appellate route by choosing the initial forum. Xerox and Volt initially sought review of the contract award before the GSBCA, and EDS presented the same claims to GSBCA it seeks to air here. The appropriate appellate forum for the GSBCA's decision is the Federal Circuit. Under TRAC therefore, this Court has no jurisdiction to hear EDS' claims.

EDS and GPO contend that because GPO initially determined that the contract was not for ADPE, the contract appropriately was not conducted under GSA's Brooks Act procurement authority. Thus, they reason, the GSBCA has no jurisdiction under CICA to hear the case, and the exclusive appellate provisions outlined above do not apply. In addition, EDS and GPO claim that the Brooks Act should not apply to this contract because GPO is exempt from the Act, and because in any event the contract was not for ADPE.[2] The Court notes that these arguments were also raised before and decided by the GSBCA, and would ultimately be reviewable by the Federal Circuit. EDS is seeking here to collaterally attack the adverse ruling of the GSBCA. Whatever the merits of EDS' claims, Congress and *TRAC* make clear that they belong before the statuorily designated appellate body - the Federal Circuit. For this Court, in the context of the present case, to construe the Brooks Act to remove either all GPO-ADPE contracts from GSA's procurement authority or to make a factual finding that this contract is not for ADPE and therefore not within the Act, would have a significant effect on the Federal

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[1] CICA defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 40 U.S.C. § 759(h)(9)(B).

2/ EDS also claims that only OMB has exclusive preliminary jurisdiction to resolve these issues, and accordingly requested OMB to decide whether the contract is for ADPE and within the Brooks Act by letter on February 3, 1986. GPO and GSA agree. The GSBCA held to the contrary. *Xerox Corporation*, No. 8333-P, slip op. at 8 (GSBCA February 4, 1986). The various Government parties also disagree about the binding effect of OMB's decision. The statutes setting up OMB and GSBCA review are subject to conflicting interpretations. *E.g.*, *SDA Federal Systems, Inc.*, 85-3 BCA ¶ 18,493 (October 18, 1985) (holding GSBCA not OMB has jurisdiction over "ADP" disputes). In spite of the parties' contentions, this inter-agency jurisdictional conflict supports transfer to the Federal Circuit, to achieve consistency in review of GSBCA's claims of ADP jurisdiction.

Further, the question of GPO's exemption from the Brooks Act is essentially an inter-agency dispute about the extent and nature of their respective territories. The present agency territories have been established by Congress, and it is the legislature's role to mend any fences in need of repair. The Court is not overwhelmed with the cries of protest from the agencies involved in this case: they have known of the Brooks Act's scope, and have chosen not to proceed under the Act or to get a determination from OMB prior to the contract solicitation and award.

Circuit Court's jurisdiction, and would produce the "duplicative and potentially conflicting review" TRAC sought to avoid. *E.g.*, TRAC, 750 F.2d at 78.

EDS also claims that it is an "interested party" under CICA, and that this Court should hear its claims in order to protect its own post-award jurisdiction under *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The Court finds highly untenable plaintiff's position that Congress intended in CICA to provide contract awardees with access to District Court for review of the contracts they receive, when no claim of breach or impropriety by the contracting agency is made.3/ Indeed, plaintiff points to no legislative history in support of this reading of CICA. Further, the District Court's post-award jurisdiction does not encompass actions brought to review the GSBCA's proceedings or assertion of jurisdiction, which is fundamentally all plaintiff is seeking here.

Plaintiff finally contends that the Federal Circuit would not hear this action, because it does not involve a "final" board decision. The Court makes no finding as to the finality of GSBCA's decision for purposes of review, but notes that any lack of finality may postpone but not preclude the Federal Circuit's exercise of jurisdiction. Even if this case were not ripe for review, under TRAC the Court would have to transfer it

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3/ In any event, GPO as the contracting agency could not have filed in this Court for post-award review of its own award of the contract. This makes all the more awkward the procedural posture of the case as filed before this Court.

to the appropriate forum for dismissal. See Public Utilities Commission of Oregon v. Bonneville Power Administration, 767 F.2d 622, 630 (9th Cir. 1985) (District Court lacked jurisdiction under TRAC to dismiss on ripeness grounds a constitutional challenge to statute).

Accordingly, for the foregoing reasons it is hereby

ORDERED that defendant GSA's motion to transfer is granted and this case is transferred forthwith to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1631, and the Clerk of Court shall transfer the files of this case to the United States Court of Appeals for the Federal Circuit. In the interest of justice, without intending any suggestion as to how or whether the Federal Circuit should rule on the question of interim relief, it is

FURTHER ORDERED that the temporary restraining order which was issued by the Court on February 19, 1986 shall remain in effect during the transfer process to preserve the status quo until such time as the Federal Circuit is able to rule on any motion for interim relief. The temporary restraining order shall accordingly expire 10 days from the date of its issue, or upon a decision by the Federal Circuit as to interim relief, or upon the decision of OMB on EDS' inquiry, whichever occurs first.

Thomas F. Hogan
United States District Judge

Dated: February 21st, 1986

GENERAL SERVICES ADMINISTRATION

BOARD OF CONTRACT APPEALS

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Protests of :

XEROX CORPORATION : GSBCA No. 8333-P

VOLT INFORMATION SCIENCES, INC. : GSBCA No. 8336-P

Solicitation No. RFP 600-S :

- - - - - - - - - - - - - - - - - - -x

General Services Administration
Room 4042
18th and F Streets, N.W.
Washington, D.C. 20405

Thursday, January 30, 1986

The above-entitled matter came on for hearing, pursuant to notice at 11:58 a.m.

BEFORE: JUDGE VINCENT A. LaBELLA
- and -
JUDGE LEONARD SUCHANEK

ORAL ARGUMENT ON BEHALF OF THE INTERVENING
AGENCY: GENERAL SERVICES ADMINISTRATION

MS. STEVENS: I would like to start out by making clear again that GSA's assumption in this brief and in this presentation is that the question here, based on your provided assumption, is whether GSA under the Brooks Act has authority over GPO.

JUDGE LaBELLA: Assuming that we have here --

MS. STEVENS: Based on the assumption you provide --

JUDGE LaBELLA: And the assumption is that what we have here is a procurement for ADPE, which includes ADP support services, together with printing and binding services.

MS. STEVENS: I don't know about support services, but it includes ADPE and some definition of printing.

We do not know what was procured here.

JUDGE LaBELLA: You have a copy of the RFP, right?

MS. STEVENS: We received a copy of the RFP on Monday. We do not consider that that tells us conclusively what the Public Printer procured, and we would assume -- we have gone on the assumption that the next question in this case would be what was procured, and was the procurement an ADP procurement within the Brooks Act.

Therefore, our arguments in our brief and my arguments now relate solely to the question of whether the Public Printer, the GPO, has been exempted from the Brooks Act and do not touch on what was procured in this procurement and whether that service, equipment, or whatever it may be was a Brooks Act procurement.

JUDGE LaBELLA: I don't know about not touching on what was made in this procurement. But I did ask you to assume that what we have here is a procurement for both ADP and printing services.

MS. STEVENS: Well, it certainly would be procurements which were for both ADP and printing services over which we would assert Brooks Act jurisdiction.

JUDGE LaBELLA: Fine.

MS. STEVENS: There would be other over which we would not.

JUDGE LaBELLA: Why?

MS. STEVENS: Because there would be printing services procurements which included ADP which would not fall under the FRMR, would not fall within the Brooks Act.

JUDGE LaBELLA: Why?

MS. STEVENS: Well, one possibility would be that the ADP included was unseverable, that it was not separate from the printing, or that it was special purpose, that it could only be used for printing processes, and therefore would not come under the general purpose description of the Brooks Act.

So that GSA's position is, we must see more than the

RFP to be able to give you our clear answer on whether this procurement is subject to the Brooks Act.

JUDGE LaBELLA: What do you need to see in addition to the RFP?

MS. STEVENS: We would need to see at least parts of the technical proposals offered, particularly that offered by the successful vendor.

JUDGE LaBELLA: Are you suggesting, then, that GSA doesn't know whether it has jurisdiction over a procurement until it sees what the procurement produces?

MS. STEVENS: Well, we believe that our regulations make it fairly clear to the agency when they should come to us for a delegation before they start a procurement, and that the agency can make a determination of what it believes it's buying and what kinds of offers it believes it's going to get.

JUDGE LaBELLA: So you're saying you can't take a position today?

MS. STEVENS: I cannot take a position today, and I did not understand that that was to be included. I understood the assumption that you provided, Judge LaBella, to be such that the question that was to be determined, based on the briefs and arguments through today, was, does GSA have Brooks Act jurisdiction over GPO, should the GPO be buying -- making a Brooks Act procurement?

JUDGE LaBELLA: Should the GPO be buying ADP and that leaves us in terms of all of the other parties. I suppose it leaves us at this point, and that is that GSA simply isn't taking any position today.

Is that where we are?

MS. STEVENS: Well, I'm afraid that we may be there, but it certainly was not our intention, and it was not our understanding. And I'm sorry that there was a misunderstanding.

I can tell you that I have some initial statements that suggest that there is a lot of ADP in the RFP. But I cannot take an agency position, because I do not have one. And I do not have one solely because of an apparent misunderstanding that the determination of whether this procurement was an ADP procurement, I misunderstood.

JUDGE SUCHANEK: I don't know how it's possible that GSA could have misunderstood the Board's direction.

JUDGE LaBELLA: Well, in any event, what I am going to ask for is, if there is any party here who wants to file a written response, you may do so by noon tomorrow, and by noon tomorrow, I would direct the GSA to respond to the points that have been raised here and to take a position.

In addition, as I had indicated before we started argument, the reason that we took no action with respect to the suspension and we simply postponed it was because of the serious allegations made by GPO and EDS with respect to basic

BEFORE THE
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS
Washington, D.C. 20405

Protest of	)	
	)	
XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC.	))	GSBCA No. 8333-P No. 8336-P
	)	
RFP 600-S (Government Printing Office)	)	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION

The General Services Administration (GSA) has argued in its previous Memorandum in this protest that the Government Printing Office (GPO) is subject to the authority of the Administrator of General Services under the Brooks Act for procurements which fall under the authority of that Act.

GSA assumed arguendo, in accordance with Judge LaBella's Summary of a Prehearing Conference held on Friday, January 24, 1986 in the above-cited protests, "that the procurement at issue is for ADPE as well as for publishing and printing services." This assumption is not sufficient to determine whether the procurement is for ADPE which would fall under the jurisdiction of the Brooks Act.

Normally, the determination of whether a procurement which includes ADP equipment and services is under the authority of the Brooks Act is made by the contracting agency with the assistance of the technical and contracting people who develop the Request for Proposals (RFP). These agency personnel have an understanding of the requirement, the vendors likely to be proposing and the equipment or services likely to be proposed in response to the RFP which assist in making this determination. It is GSA's understanding from the submission and statements of the GPO and its representatives that this Brooks Act evaluation was not performed because the GPO believed that this was not a procurement subject to the Brooks Act. GSA had no notice that GPO believed it was exempt as an agency from the Brooks Act. Necessarily, GSA/IRMS personnel have no opportunity to challenge a determination that the Brooks Act is inapplicable unless, as happened here, the procurement is challenged. We believe, however, that pursuant to the Administrator's exclusive procurement authority over ADP, GSA may properly investigate and if necessary substitute its own technical expertise on the question whether a particular procurement is for ADPE. In such an instance the acquiring agency's determination deserves no particular deference.

It is more difficult for people not closely involved in a procurement to make this evaluation based on the RFP alone. However, it is the determination of GSA Information Resources Management Service (IRMS) personnel who have reviewed this RFP that this is an ADP procurement which should have been conducted under the provisions of the Brooks Act and its implementing regulations.

GSA/IRMS personnel have reviewed the GPO RFP and proposal conference questions and answers provided by the GPO in their Appendix to Memorandum of Points and Authorities in Support of the United States Government Printing Office's Motion to Dismiss for Lack of Jurisdiction, on an expedited basis. Based on this review, and without reference to any other representation of any party, it is GSA's position that this procurement is for ADP resources in support of a publishing service application and is covered by the Brooks Act and implementing regulations, the Federal Information Resources Management Regulation (FIRMR). The procurement falls within the applicability provision set forth at FIRMR 201-1.103(b)(1). This is a procurement for automatic data processing equipment and services falling under the non-exempted portion of FIRMR 201-1.102-3(a)(5), i.e., ADP equipment or services to be used for routine administrative and business applications, in this case publishing.

The overwhelming use of the system and monies expended under this contract will be for ADP equipment, teleprocessing services, telecommunications, software development, and system maintenance. This contract is for design, development, and implementation of an automated editing system. The RFP unmistakenly required significant amounts of ADP to be installed at Government sites, a very sophisticated distributed data base system to be designed and used in conjunction with a satellite based communications system to tie the equipment together as well as extensive teleprocessing services at the contractor site.

Under the caption Operation and Service at page 51 of the RFP it is provided:

> The service must provide for a totally automated environment for management, publication, and transmission of all technical publications and related management reports for the Army. In order to fully understand the nature of the operation, a step-by step explanation of each operation is hereby provided. These steps are: (1) Input of text and graphics, (2) In-process manual development, (3) Retrieval and modification of finalized documents, (4) Copy output, and (5) Management of publications production. (Printing to be done at contractor's facility(s) is covered as a separate operation.)

GSA/IRMS believes that this overview essentially describes the creation, management, and use of a publication data base and the capability to manipulate this data base. This is clearly an ADP service. See FIRMR 201-2.001 (ADP services, ADP support services). The price schedules at pages 18-19 list the services which will perform these functions, which constitute ADP resources. See, for example, page 59, paragraph 17 of the RFP. Further, at page 92 of the RFP LAN (local area networks) types and configurations are described. It is there stated:

> . . .Common to all LAN's will be the need for communication with other locations and with the central publishing base, access to management systems information and the electronic mail system, and any software required to perform all system functions as described. . . .

This brief recitation demonstrates that this procurement is not a printing contract with incidental ADPE but rather an ADP procurement in support of a printing purpose.

Thus, it is GSA's position, based on a review of the RFP alone that the procurement under protest is a Brooks Act procurement.

GPO suggested, at oral argument, that the Department of Defense FAR Supplement at Section 270.101(c) is intended to exempt a procurement for ADPE which is being used in a printing application. If it is so intended, it is in conflict with FIRMR 201-1.302(c) and 201-1.603.

Since this procurement is for ADP equipment and services it must be done under a delegation of procurement authority. It is our understanding that the price proposed by EDS, the successful contractor, for a five year period was approximately $64,000,000. Thus, it would appear that the contract price is approximately $12,000,000 per year. Under FIRMR 201-23.104-7 this procurement would require a specific delegation of procurement authority. The GPO has not submitted the required agency procurement request for this procurement and thus does not have a delegation of procurement authority.

Arthur J Reid, Jr.
RICHARD SHACKLEFORD
Chief Counsel
Claims and Litigation Division

1- 31- 86
DATE

Dinah Stevens
DINAH STEVENS
Attorney-Advisor
Information Resources and Utilities Division

1/31/86
DATE

1861 · 125th ANNIVERSARY · 1986

United States Government Printing Office
Washington, D.C. 20401

OFFICE OF THE PUBLIC PRINTER

February 3, 1986

The Honorable James C. Miller, III
Director, Office of Management & Budget
Old Executive Office Building
Washington, D.C. 20503

Dear Mr. Miller:

This letter is written to request that you exercise your inter-agency dispute resolution authority under 40 U.S.C. § 759(g) and determine that Government Printing Office ("GPO") procurements of printing pursuant to 44 U.S.C. §§ 501 and 502 are not subject to the authority of the General Services Administration ("GSA") under the Brooks Act, P.L. 89-306.

This dispute between GPO and GSA as to the proper scope of each agency's respective authority has recently developed in the context of a major contract we recently awarded (the "600-S Program or Contract"). On January 9, 1986, GPO awarded a contract for integrated publishing services to provide Department of the Army with technical and training manuals. The contract was awarded to Electronic Data Systems Federal Corporation ("EDS") which submitted the lowest offer on the 600-S Program and its proposal received the highest technical score. Over the 5-year life of the program, the value of the contract is estimated to exceed $300 million.

This procurement was conducted from the outset as a procurement of printing pursuant to the Public Printer's exclusive authority over public printing. The procurement is solely for printing. No automatic data processing equipment ("ADPE") is being purchased or leased, although all the offerors proposed to use computer-assisted elements in providing the requested printing. The Government Printing Office has never had any doubt that this procurement is within its exclusive authority over public printing and not subject to the GSA's authority over ADPE procurements. Certainly no provision of GSA's Federal Information Resources Management Regulation provides any support for the proposition that a procurement of printing services is subject to the GSA's procurement authority over automatic data processing equipment under the Brooks Act. Nor has GSA ever indicated to us that they would deem this procurement of printing to be subject to the Brooks Act.

Furthermore, during the lengthy course of the procurement none of the competitors ever questioned the validity of GPO's determination to conduct the 600-S procurement as a printing procurement pursuant to GPO's exclusive authority over public printing. Nonetheless, following the award, two unsuccessful offerors, Xerox Corporation and Volt Information Sciences, Inc., filed protests on January 16 and 21, 1986, respectively, before the General Services Administration Board of Contract Appeals ("GSBCA"), GSBCA Nos. 8333-P and 8336-P. The asserted jurisdictional basis for filing the protests before the GSBCA is the contention of the protestors that the 600-S Program is a procurement of automatic data processing equipment subject to the GSA's government-wide procurement authority under the Brooks Act and that therefore the GSBCA has jurisdiction under § 2713 of the Competition in Contracting Act of 1984, 40 U.S.C. § 759(h).

On January 27, 1986, GPO filed a motion with the GSBCA to dismiss for lack of jurisdiction. That motion and its supporting memorandum are enclosed. GPO's memorandum and the Request for Proposals submitted as an appendix thereto (a copy of which is also enclosed), show that this is a printing procurement and that neither GSA nor the GSBCA has jurisdiction over the challenged procurement. GPO's memorandum also points out that the Office of Management and Budget is the statutorily designated arbiter of inter-agency disputes under the Brooks Act. GSA filed a memorandum in opposition of GPO's motion, and a copy of that memorandum is enclosed.

On January 30, 1986, the GSBCA heard oral argument on GPO's motion to dismiss.[1] The Board indicated that it would issue an opinion deciding the jurisdictional question no later than Wednesday morning, February 5, 1986, and that it would hold a hearing at 2:00 p.m. that day (assuming that it denies GPO's motion) on whether to suspend the contract. GPO thus faces the imminent possibility that this significant printing and publishing contract of great importance to the Army will be ordered terminated by a Board that has no lawful jurisdiction over GPO on this procurement. Should the contract be suspended, the Government would lose approximately $49,000 per day in foregone savings as compared with the current methods of publishing Army technical manuals.[2]

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[1] GPO filed a supplemental post-hearing brief, a copy of which is also enclosed.

[2] I previously made this estimate in connection with my finding under 31 U.S.C.A. § 3553(d)(2) that, notwithstanding a GAO protest filed by a third unsuccessful offeror, AT&T Technologies, Inc., continued performance of this contract would be in the best interests of the United States. A copy of this determination is enclosed. (GAO dismissed AT&T's protest, noting that AT&T could resubmit a timely protest should the GSBCA dismiss the proceedings before it.)

Because of the urgency and importance of this matter, we urge you to give this request expedited consideration. Should you require any further information for your record, we stand ready to respond to your requests.

Sincerely,

Ralph E Kennickell Jr.

RALPH E. KENNICKELL, JR.
Public Printer

cc: The Honorable Terence C. Golden,
Administrator, General Services
Administration
(Without Enclosures)

The Honorable Charles McC. Mathias, Jr.
Chairman, Joint Committee on Printing
(Without Enclosures)

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Before The

GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS

Washington, D.C. 20405

Protests of XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC. Relating to the Government Printing Office Solicitation No. 600-S	GSBCA Nos. 8333-P and 8336-P

UNITED STATES GOVERNMENT PRINTING OFFICE'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Respondent United States Government Printing Office ("GPO"), by and through its undersigned counsel and pursuant to GSBCA Rules 2(b) and 12(f), moves for leave to supplement the record in this case with the attached letter from Ralph I. Kennickell, Jr., the Public Printer, to James C. Miller, III, Director, Office of Management and Budget ("OMB"), dated February 3, 1986. The grounds for this motion are set forth in the following paragraph.

On January 27, 1986, respondent GPO moved the Board to dismiss this case for lack of jurisdiction. In its memorandum in support of that motion, respondent GPO took the position (pp. 21-22) that under the Brooks Act, 40 U.S.C. § 759(g), OMB, and not the Board, is to resolve conflicts between the General Services Administration ("GSA") and procuring agencies concerning the coverage of that Act. The February 3, 1986 letter from Mr. Kennickell to Mr. Miller is directly relevant to GPO's position that OMB is authorized to resolve disputes concerning the coverage of the Brooks Act such as that presented here and therefore is directly relevant to the jurisdictional issue before the Board. Of course, that letter was not in existence when GPO filed its post-hearing brief on January 31, 1986, and thus could not have been filed with that brief.

For these reasons, the Board should supplement the record with the attached letter.

Respectfully submitted,

I. Michael Greenberger

James C. Lane, Jr.

Associate General Counsel
Office of General Counsel
U.S. Government Printing Office
North Capitol and H Streets, N.W.
Washington, D.C. 20401
(202) 275-2757

I. Michael Greenberger
Jeffrey C. Martin

Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Respondent
Government Printing Office

Dated: February 4, 1986

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 14 1986

Honorable Ralph E. Kennickell
Public Printer
Government Printing Office
Washington, D.C. 20401

Dear Mr. Kennickell:

We have received your request dated February 3, 1986 to review and resolve a disagreement between the Government Printing Office and the General Services Administration regarding the applicability of the Brooks Act (Public law 89-306) to the 600-S contract awarded on January 9, 1986.

We are presently reviewing the matter and expect to make a determination not later than March 4, 1986.

Sincerely,

Wendy L. Gramm

Wendy L. Gramm
Administrator for Information
and Regulatory Affairs

cc: Honorable Terence C. Golden
Administrator, General
Services Administration

Exhibit A
Civil Action No. 86-353

Board of Contract Appeals

General Services Administration
Washington DC 20405

February 4, 1986

Protests of **XEROX CORPORATION**	GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.	GSBCA No. 8336-P
Solicitation No. RFP 600-S	Motions of EDS and GPO to dismiss for lack of jurisdiction, untimeliness or frivolousness denied; motions of AT&T and Volt to strike supplemental response of EDS denied; motions of GSA and GPO for leave to supplement the record granted
Appearances for Protester, Xerox Corporation	Irwin Goldbloom, Esquire Thomas L. Patten, Esquire Franklin G. Snyder, Esquire Linda S. Potter, Esquire Latham, Watkins & Hills 1333 New Hampshire Avenue, N.W. Suite 1200 Washington, DC 20036
Appearances for Protester, Volt Information Sciences, Inc.	Thomas F. Williamson, Esquire Marcia G. Madsen, Esquire D. Brent Israelsen, Esquire Morgan, Lewis & Bockius 1800 M Street, N.W. Washington, DC 20036
Appearances for Respondent, U.S. Government Printing Office	James C. Lane, Jr., Esquire Associate General Counsel Office of General Counsel U.S. Government Printing Office North Capital and H Streets, N.W. Washington, DC 20401
	I. Michael Greenberger, Esquire Shea & Gardner 1800 Massachusetts Avenue, N.W. Washington, DC 20036
	Robert S. Gorman, Esquire Contract Law Division U.S. Department of the Army Room 2C439, Pentagon Washington, DC 20310-2208

Appearances for Intervenor, Electronic Data Systems Federal Corporation	Donald C. Holmes, Esquire Joseph D. West, Esquire Michael A. Gordon, Esquire Jones, Day, Reavis & Pogue 655 Fifteenth Street, N.W. Washington, DC 20005-5701
	Richard P. Shlakman, Esquire James D. Duffy, Esquire Electronic Data Systems Federal Corporation 6430 Rockledge Drive Bethesda, MD 20817
Appearances for Intervenor, AT&T Technologies, Inc.	Arthur Lazarus, Jr., Esquire Paul Shnitzer, Esquire Carl J. Peckinpaugh, Esquire Fried, Frank, Harris, Shriver & Jacobson 600 New Hampshire Avenue, N.W. Suite 1000 Washington, DC 20037
Appearances for Intervening Agency, General Services Administration	Richard Shackleford, Esquire Anthony L. Washington, Esquire Claims and Litigation Division Dinah Stevens, Esquire George N. Barclay, Esquire Information Resources and Utilities Division Office of General counsel General Services Administration 18th and F Streets, N.W. Washington, DC 20405

Opinion by Administrative Judge LaBella[1]

Xerox Corporation (Xerox), GSBCA No. 8333-P, and Volt Information Sciences, Incorporated (Volt), GSBCA No. 8336-P, are protesters at this Board contesting the actions of respondent, the United States Government Printing Office (GPO), concerning solicitation number RFP 600-S issued by GPO for the United States Department of the Army (Army). Intervenors of right are both Electronic Data Systems Federal Corporation (EDS), the awardee under the solicitation, and AT&T Technologies, Incorporated (AT&T), a disappointed offeror. The General Services Administration (GSA) has also intervened.

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[1] The Board acknowledges the significant contribution to this opinion of Joseph A. Vergilio, Staff Counsel.

Presently before the Board are motions filed by EDS and GPO requesting that the protests be dismissed for lack of jurisdiction, and in the alternative for untimeliness or frivolousness. We deny these motions because we decide that (1) GPO is an agency subject to the Brooks Act, (2) procurements for publishing and printing services which include ADP are subject to the Brooks Act notwithstanding GPO's failure to seek a delegation of procurement authority, and (3) timeliness is not a consideration in determining jurisdiction. However, GPO and EDS have not waived their right to argue that general purpose automatic data processing (ADP) resources are not the subject of this procurement. That issue will be determined, if argued, after all parties have had the opportunity for discovery, and when this case is decided on the merits. The Board also denies AT&T's "motion to strike the supplemental memorandum of points and authorities in support of intervenor Electronic Data Systems Federal Corporation's motion to dismiss for lack of jurisdiction" (filed January 29, 1986) and grants GSA's "motion for leave to supplement the record" (filed January 31, 1986).

Background

Xerox filed its protest with this Board on January 16, 1986, alleging the following GPO improprieties:

> The purported award of Contract 600-S to EDS by GAO [sic--GPO] and the Army subsequent to the filing of a protest with GAO by AT&T -- and notice of such protest to GPO -- was in violation of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1)-(2), which prohibits award of contracts following notice of protests absent specific findings and notice to GAO. See FAR 33.104(b)(1). Such findings and notice were not made by GPO or the Army. The award of the contract to EDS, if made, was unlawful and was void *ab initio*.
>
> The actions of GPO and the Army in permitting EDS to lower its price by $21,000,000 after the closing date for BAFOs, and accepting that reduced price, constituted further negotiations and discussions with EDS following submission of BAFOs. See FAR 15.611(c); GPO Printing Procurement Regulations ch. XV, § 4.c(4); RFP No. 600-S § B.III.a. Consideration of the post-BAFO EDS price, without engaging in further discussions with all bidders and/or seeking a new round of BAFOs, granted EDS an unfair competitive advantage. If a post-BAFO price reduction was permitted, all offerors in the competitive range should have been permitted to engage in discussions and another round of BAFOs. See FAR 15.610(b), 15.611(c), 15.607(a).
>
> Failure to require the final EDS system to meet benchmark requirements was a violation of the terms and requirements of RFP 600-S, which required that contractors demonstrate operation of a totally integrated and operational system, and that supporting equipment be demonstrated in a production environment.

> See RFP No., 600-S § C. By failing to require EDS to meet the requirements of the RFP, GPO and the Army acted in violation of applicable laws and regulations which require full and open competition and fair and equal treatment of offerors. See FAR 15.603; FIRMR 201-11.001.
>
> The bid submitted by EDS was not responsive to the solicitation, in that EDS never demonstrated compliance with the technical requirements of the RFP.
>
> Employment by EDS of an Army employee involved in the procurement, during the term of such procurement, tainted its participation in the bid process, and gave it an unfair competitive advantage in the procurement. See NKF Engineering, Inc., Comp. Gen. B-220007, 85-2 CPD ¶ 638 (Dec. 9, 1985).
>
> The evaluation criteria and tests used by and relied upon by the Army and GPO in evaluating the technical aspects of proposed systems, and in arriving at the technical rating factors, were vague, erroneous, and inconsistent, and their application to Xerox violated the terms of the RFP and the benchmark package. The test criteria arbitrarily discriminated against offerors based on factors not included in the RFP. Test criteria cannot be created which arbitrarily favor one bidder over another. Xerox's bid was evaluated on technical factors which were not specified in the solicitation, in violation of applicable laws and regulations. See FAR 15.605, 15.606, 15.608.

Protest complaint (filed January 16, 1986) at 12-15.

Volt asserts the following grounds for its protest:

> (1) GPO and the Department of the Army (Army) failed to obtain a delegation of procurement authority from the Administrator for this procurement; (2) the criteria used for Volt's benchmark test were different from those stated in the RFP and no benchmark test was conducted for one mandatory requirement; (3) following the benchmark tests, another offeror, TPC Logistics Services, which had successfully completed its benchmark test, teamed or otherwise subcontracted with EDS, resulting in a combined system which was never benchmark tested and which was given an enhanced technical score; and (4) at least two other offerors impermissibly revised their prices after submission of best and final offers.

Complaint (filed January 21, 1986) at 1.

On January 23, 1986, the Board received EDS's motion to dismiss for lack of jurisdiction in which EDS sets forth two grounds supporting its motion: (1) under 44 U.S.C. § 311 (1982) GPO procurements are expressly exempt from the Brooks Act, and, hence, not within this Board's jurisdiction, and (2) the solicitation is for printing and publishing services, not automatic data processing equipment (ADPE). EDS also requests the dismissal of the protests as both untimely and frivolous, because, it says, all parties have known for over one year that the procurement was being conducted without regard to the requirements of the Brooks Act. EDS also filed a supporting memorandum of points and authorities.

On January 24, 1986, a conference was held between the Board and representatives from Xerox, Volt, AT&T, GPO, Army, EDS and GSA. It was agreed that the parties would first address the issue of the Board's jurisdiction over a protest of any GPO procurement, assuming arguendo that the procurement at issue is for ADPE as well as for publishing and printing services. A schedule for the receipt of briefs and a date for oral arguments on this jurisdictional issue was also established. GPO was to file a brief on this issue by January 27, 1986, and the other parties were permitted until noon on January 29, 1986, to file briefs in response. The Board granted GPO's request to defer the suspension hearing until such time as it ruled on the jurisdictional issue. Under Rules 19(a)(2) and 2(b) that hearing is required to be held no later than ten days after the filing of the protest. However, Rule 1(d) permits the Board to make such rulings and issue such orders and directions as are necessary to secure the just, speedy, and inexpensive resolution of every case before it. This happens to be one such circumstance. The delay was necessary to properly resolve the threshold question raised by EDS and GPO whether this Board has jurisdiction over GPO.

On January 27, 1986, GPO submitted a motion to dismiss for lack of jurisdiction and memorandum in support thereof, in which GPO premised its request on the following arguments: (1) under Public Law Number 94-440, the procurement, paid for out of GPO's revolving fund, is expressly exempt from the Brooks Act, (2) a printing procurement is involved so that GPO is exempt from the Brooks Act, (3) this Board lacks jurisdiction under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (CICA), over a procurement not conducted by GSA or under a delegation of procurement authority under the Brooks Act, (4) the protests are untimely, and (5) the procurement is not for ADPE.

On January 29, 1986, the Board received from Xerox, Volt, AT&T and GSA, written oppositions to the motions to dismiss. EDS filed on January 29, 1986, a supplemental memorandum of points and authorities in support of its motion to dismiss for lack of jurisdiction. On the same day AT&T filed a motion to strike this supplemental memorandum submitted by EDS. Volt has joined in AT&T's motion.

Oral arguments were held on the record, on January 30, 1986, and representatives for all parties concerned attended. On January 31, 1986, Xerox, Volt, GSA, GPO and EDS, each submitted, by the noon deadline, a written memorandum in support of its position.

Also on January 31, 1986, GSA filed a "motion for leave to supplement the record" with a letter dated January 30, 1986, to Terence C. Golden, Administrator, GSA, which reads as follows:

> On behalf of the House Committee on Government Operations and the Joint Committee on Printing, we would like to take this opportunity to bring an important matter to your attention.
>
> Owing to rapidly evolving technology, considerable confusion has arisen concerning the manner in which certain products and services incorporating both printing and automatic data processing (ADP) features are procured. One recent instance is the award of a contract issued earlier this month, pursuant to RFP 600-S by the Government Printing Office for the Army Integrated Publishing Service. The lack of certainty in some quarters about the procurement authorities required in such cases prompts us to comment jointly on this matter.
>
> It is the position of both the Government Operations Committee and the Joint Committee on Printing that in procurements of this nature all pertinent laws, regulations, and guidelines should be adhered to. Procurements for printing systems and services should be made pursuant to sections 501 and 502 of Title 44, United States Code, and the policies and guidelines of the Joint Committee on Printing. Where such procurements incorporate general ADP features, they also should be conducted in accordance with the provisions of P.L. 89-306 (Brooks Act).
>
> In any procurement for which the purchasing agency is unsure about how to proceed, the agency should seek the guidance of the Genreal Services Administration, the Government Printing Office, the Government Operations Committee and the Joint Committee on Printing.

This letter was jointly signed by the Honorable Jack Brooks, Chairman, House Committee on Government Operations, the Honorable Frank Horton, Ranking Minority member, House Committee on Government Operations, the Honorable Charles McC. Mathias, Chairman, Joint Committee on Printing, and the Honorable Frank Annunzio, Vice Chairman, Joint Committee on Printing. According to GSA's motion, a copy of this letter was received by the Information Resources Management Service of GSA at approximately 12:30 p.m. on January 31, 1986, and attached to GSA's motion filed at the Board approximately two hours later. EDS filed on the morning of February 4, 1986, an opposition to GSA's motion.

On February 4, 1986, GPO filed a motion for leave to supplement the record with a letter dated February 3, 1986, from the Honorable Ralph I.

Kennickell, Jr., the Public Printer, to the Honorable James C. Miller, III, Director, OMB. The letter indicates that it was "written to request that you exercise your inter-agency dispute resolution authority under 40 U.S.C. § 759(g) and determine that Government Printing Office ("GPO") procurements of printing pursuant to 44 U.S.C. §§ 501 and 502 are not subject to the authority of the [GSA] under the Brooks Act, P.L. 89-306."

Discussion

I. GSA motion to supplement the record

Under Rules 2(b) and 12(f) GSA moves to supplement the record with the above-quoted letter expressing the views of the Government Operations Committee and the Joint Committee on Printing regarding the applicability of the Brooks Act to procurements for printing systems and services. EDS has opposed this motion. We find the letter to be relevant evidence contravening a position the GPO purports to support at this protest. Counsel for GSA acted promptly in seeking to admit this relevant information into evidence and could not have obtained the information in time to submit it by the noon deadline. Therefore, finding good cause for the submission after noon and noting that the information is relevant and beneficial to the record before the Board, we grant GSA's motion and deny EDS's opposition to GSA's motion.

II. AT&T's and Volt's motion to strike EDS's supplemental filing

At the conference held on January 24, 1986, none of the parties objected to the schedule the Board established, which permitted each party to submit by noon on January 29, 1986, its response to GPO's brief to be filed on January 27, 1986. EDS, filed such a brief, even though it has intervened on the side of GPO. The Board's order at the conference did not prohibit EDS from making such a submission, which we deem to be appropriate. Therefore, we deny the motions of AT&T and Volt.

III. GPO's motion for leave to supplement the record

Under Rules 2(b) and 12(f) GPO moves to supplement the record with the above-referenced letter from the Public Printer to OMB. This letter, not in existence at the time for filing reply briefs on January 31, 1986, is relevant to the proceedings, and we therefore grant GPO's motion and supplement the record.

IV. Jurisdictional motions

A number of interrelated matters immediately confront this Board regarding our jurisdictional authority over these protests. A preliminary issue is whether the Brooks Act is applicable to GPO procurements. We hold that it is. Second, given that GPO has indisputably conducted this procurement without reference to the Brooks Act and GSA or any delegation of procurement authority (DPA), a two-fold question arises as to (1) whether the Board, as opposed to the Office of Management and Budget (OMB), is the proper arbiter of what GPO characterizes as an inter-agency dispute regarding the applicability of the Brooks Act, and (2) whether the Board has authority to hear and decide a protest regarding a procurement not conducted according to the Brooks Act. We hold that the Board, not OMB, is to hear and decide the issue at this time, and that CICA vests the Board with the requisite grant of authority to hear this protest. Additionally, we have the authority to decide the jurisdictional issue. Finally, the question of whether or not this procurement is one for general purpose ADP resources falling within the Brooks Act is not finally decided, and awaits a fully developed evidentiary record should GPO or EDS contend that the special purpose nature of the ADP resources takes it outside the Brooks Act. We proceed on the basis that the ADP resources described in the solicitation may be presumed to bring this procurement within the purview of the Brooks Act unless GPO or EDS persuades us otherwise.

a. GPO and the Brooks Act

The Brooks Act authorizes and directs the Administrator of the GSA "to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies." 40 U.S.C. § 759(a) (1982). The Administrator is to accomplish this either directly or by means of a delegation of procurement authority. 40 U.S.C. § 759(b) (1982). The inclusive nature of the Brooks Act is expressly revealed in the Act itself, which references the Federal Property and Administrative Services Act of 1949 (FPASA), as amended:

> The proviso following paragraph (4) in section 481(a) of this title [which deals with transportation and public utility services] and the provisions of section 474 of this title [quoted below] shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

40 U.S.C. § 759(e) (1982). The second referenced provision, 40 U.S.C. § 474, as amended in 1950, states, in relevant part, as follows:

> Nothing in this Act [the FPASA] shall impair or affect any authority of--
>
> . . . .
>
> (18) the Joint Committee on Printing, under the Act entitled "An Act providing for the public printing and binding and the distribution of public documents" approved January 12, 1895 (28 Stat. 601), as amended or any other Act; . . . .

64 Stat. 590 (1950).[2] Given the express language of the Brooks Act,

---

[2] This language of paragraph (18) has been codified to read: "(18) the Joint Committee on Printing, under title 44 or any other Act". 40 U.S.C. § 474(18) (1982).

procurement activities of the Joint Committee on Printing (JCP) and thus the GPO, were covered by the Brooks Act as it was enacted in 1965.[3] The General Accounting Office agrees. 48 Comp. Gen. 462 (1969).

EDS and GPO bring to this Board's attention various subsequent enactments which they contend presently exempt GPO from Brooks Act coverage. In no instance is their argument successful. One provision provides that "[p]urchases may be made from appropriations under the 'Government Printing Office' without reference to the Federal Property and Administrative Services Act, approved June 30, 1949, as amended, concerning purchases for the Federal Government." Pub. L. No. 90-620, 82 Stat. 1238 (1968) (44 U.S.C. § 311 (1982)). This language appears to permit GPO to conduct procurements without reference to the Brooks Act, which was enacted as an amendment to the FPASA. The GPO exception, however, was initially enacted in 1953, and the subsequently enacted Brooks Act makes inapplicable any such inconsistent provisions of law. In 1968 the GPO exemption was merely codified during the recodification of Title 44, United States Code. The legislative history to this recodification statute clearly and unmistakably expresses an intent not to make substantive changes in the law:

> SUBSTANTIVE CHANGE NOT INTENDED
>
> Like other recent codifications undertaken as a part of the program of the Committee on the Judiciary of the House of Representatives to enact into law all 50 titles of the United States Code, there are no substantive changes made by this bill enacting title 44. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

S. Rep. No. 1621, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. Code Cong. & Ad. News 4438, 4439-40. Because this codification was based on statutory language in effect at the time the Brooks Act was enacted, the language of the Brooks Act controls. The earlier enacted law cannot be read to exclude GPO from coverage of the Brooks Act.

Next, the GPO points to the language contained in the Legislative Branch Appropriations Act, 1977:

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[3] The JCP and GPO have been established by statute, 44 U.S.C. Chapters 1, 3 (1982). The GPO may contract out for printing services only with the approval of the JCP. 44 U.S.C. §§ 501, 504 (1982).

> Government Printing Office Revolving Fund
>
> The Government Printing Office is hereby authorized to make expenditures, within the limits of funds available and in accord with the law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended, as may be necessary in carrying out the programs and purposes set forth in the budget for the current fiscal year for the "Government Printing Office revolving fund": . . . Provided further, That funds available to the Government Printing Office may be extended to purchase, lease, maintain and otherwise acquire automatic data processing equipment without regard to the provisions of 40 U.S.C. 759 . . . .

Pub. L. No. 94-440, 90 Stat. 1439, 1460 (1976). The United States Court of Appeals, Second Circuit, recently summarized the law we apply, as it relates to statutory construction:

> It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 . . . (1980); United States v. Turkette, 452 U.S. 576, 580 . . . (1981). Moreover, when a court finds the language of a statute to be clear and unambiguous, "judicial inquiry is complete, except in 'rare and exceptional circumstances.'" Garcia v. United States, ___ U.S. ___, ___, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984) (quoting TVA v. Hill, 437 U.S. 153, 187 n. 22 . . . (1978)) . . . . "[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." Garcia, ___ U.S. at ___, 105 S.Ct. at 482-83.

Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 62-63 (2d Cir. 1985). See also McDonnell Douglas Corp. v. United States, 754 F.2d 365 (Fed. Cir. 1985); Roche Products, Inc. v. Bolar Pharmaceutical Co., 733 F.2d 858 (Fed. Cir. 1984).

The language of the appropriations act is clear. The GPO exemption from the provisions of the Brooks Act relates back to the programs and purposes set forth in the budget for the 1977 fiscal year of the GPO revolving fund. If this procurement somehow falls within the fiscal year 1977 programs and purposes, EDS and GPO have failed to demonstrate this. Moreover, because of the express limitation to 1977 fiscal year programs and purposes, the recurring nature of the revolving fund does not imbue the expressly limited exception with the permanence GPO surmises.

That this language occurs in an appropriations act lends further support to the restricted reading of the waiver of Brooks Act applicability to GPO procurements. The United States Supreme Court has stated that:

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S. App.D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 355 (CA8 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978). Here, the language of the fiscal year 1977 appropriations act contains no "words of futurity" indicating a congressional intent that the exemption is to extend beyond the programs and purposes of fiscal year 1977. Just to the contrary, as noted above, the sentence explicitly limits its application to "the current [1977] fiscal year".

The Legislative Branch Appropriations Act, 1978, Pub. L. No. 95-94, 91 Stat. 653, 680 (1977), contains no reference to the continued applicability of the GPO exemption from the requirements of the Brooks Act. The act is silent on this matter of exemption. The legislative history reveals that the Committee on Appropriations knowingly made this omission:

> The Committee recommends the deletion of the exemptions to the provisions of 40 U.S.C. 759 relating to the purchase, lease, and maintenance of automatic data processing equipment, as well as the exemptions to 31 U.S.C. 638a relating to the maintenance, repair, purchase, and lease of motor vehicles. Both exemptions were carried in the 1977 bill.

H.R. Rep. No. 95-450, 95th Cong., 1st Sess. 36 (1977). The exemption found in the act of the prior year was in fact deleted and therefore has no applicability to procurements for programs and purposes initiated after fiscal year 1977.

GPO and EDS argue that the Comptroller General's decision in *Memorex Corp.*, 57 Comp. Gen. 865 (1978), 78-2 CPD ¶ 236, indicates that we should reach a contrary result. We disagree. The Comptroller General stated as follows:

> We note in this connection that GPO conducted this procurement utilizing funds in the Government Printing Office Revolving Fund authorized under the provisions of 44 U.S.C. § 309 (1970), which provide in part that the

> fund is available *without fiscal year limitation* for specified purposes. Title X of the Legislative Branch Appropriation Act, 1977, . . . authorized the GPO to purchase, lease, maintain and otherwise acquire automatic data processing equipment from these funds. We therefore believe that the GPO could accomplish *these particular procurements* without regard to fiscal *year limitations* . . . .

57 Comp. Gen. at 869, 78-2 CPD at 6 (Emphasis added). The protest involved two contracts negotiated on a sole-source basis and awarded on or before October 20, 1977. Although the precise dates of when the procurements began are not indicated in the decision, the Board presumes that each was begun in fiscal year 1977, given the award in early fiscal year 1978. Thus, without any evidence to the contrary, the Comptroller General's references to fund availability for "specified purposes" and the "particular procurements" are consistent with our reading of the statute. Moreover, the holding of the case does not relate to the continued applicability of the Brooks Act to GPO and does not, as GPO contends, reverse 48 Comp. Gen. 462, *supra*.

We note that the letter quoted above from the Committee on Government Operations and Joint Committee on Printing to the Administrator of GSA resolves the issue of Brooks Act applicability to the GPO. This is because deference must be given to the views of the Joint Committee on Printing with regard to the authority of the GPO since the Joint Committee controls the management and operations of GPO. At a minimum, GPO cannot be heard to argue an interpretation that is inconsistent with the views expressed on behalf of the Joint Committee. *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("Also, authoritative *administrative constructions* should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 . . . (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 . . . (1965)"). Nevertheless, we interpret the clear meaning of the statutes as requiring us to exercise jurisdiction over GPO.

b. Not Conducted Under the Brooks Act

The next element concerning our alleged lack of jurisdiction over these protests focuses upon the fact that GPO is not conducting this procurement under the Brooks Act, having obtained no authority from the Administrator of the GSA for its procurement. One argument would find that OMB, not this Board, is to resolve what GPO characterizes as an inter-agency dispute as to the applicability of the Brooks Act. The other argument is premised on an overly restrictive reading of the statutory grant of protest authority this Board received under CICA.

The Brooks Act, as amended, contains the following clause relating to disputes arising between agencies concerning the applicability of the Brooks Act:

> **(g) Limitation on authority of Administrator and Secretary of Commerce; notice and review of Adminstrator's determinations**
>
> The authority conferred upon the Administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any agency. *The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Office of Management and Budget unless the President otherwise directs.*

40 U.S.C. § 759 (1982) (Emphasis added). Subsequent to the enactment of this language, the CICA granted this Board the authority to hear protests:

> Upon request of an interested party in connection with any procurement conducted under the authority of this section (including procurements conducted under delegations of procurement authority) [i.e., under the authority of the Brooks Act], the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the 'board'), shall review any decision by a contracting officer alleged to violate statute or regulation. Such review shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals.

CICA, 98 Stat. 1175, 1182 (to be codified at 40 U.S.C. § 759(h)(1)).

Concomitant with this grant of protest authority is the Board's ability to determine its jurisdiction. *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1137, *rehearing en banc denied*, 634 F.2d 1355 (5th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981) ("It is well settled that a court has the jurisdiction to determine its own jurisdiction, subject to appellate review"). Thus, it is the Board which is to determine whether the protested procurement is conducted under the authority of the Brooks Act. This interpretation of the Brooks Act as a whole does not read out of the law the

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policy and fiscal control of OMB. We do not decide here whether OMB has the authority to resolve any dispute concerning whether a DPA must be obtained, but even if it does have such authority, that does not make a difference here. Once a protest is filed, part and parcel to this Board's protest authority is its ability to determine its jurisdiction, which requires a finding as to whether the Brooks Act is applicable to the procurement. This Board is not bound to OMB's view of the matter. SDA Federal Systems, Inc., GSBCA No. 8180-P, 85-3 BCA ¶ 18,493 at 92,868 ("[Respondent] offers no explanation of how it could be that OMB has any appellate role whatsoever vis a vis this Board in the litigation of protests, nor do we see how that could be the case. We answer to the Federal Circuit in protests just as we do in cases under the Contract Disputes Act of 1978, ... See 40 U.S.C. § 759(h)(6)(A)"). Thus, the fact that the GPO has now referred the question to OMB is not determinative.

For purposes of defining this Board's jurisdiction, the proposed restrictive reading of the CICA to exclude any case in which a delegation is not sought by the procuring agency is tenuous at best. From a practical standpoint, this interpretation would permit an agency to intentionally ignore the requirements of the Brooks Act only to foist the argument upon this Board that we lack jurisdiction despite a clear and unmistakable statutory violation.

A reading of the Brooks Act also evidences the untenable nature of such an interpretation. The Brooks Act mandates that the Administrator of GSA, directly or by delegation, "coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies." 40 U.S.C. § 759(a) (1982). Thus, a procurement involving the appropriate ADP resources comes within the authority of the Brooks Act. If an agency fails to obtain the required authority to procure the ADP, the statute is violated, but the failure to proceed within the parameters of the act in no way lessens its reach.

V. Timeliness and frivolousness

Separate and distinct from the jurisdictional issue, is the question regarding the timeliness of the protests, since the fact that this procurement is being conducted without GSA's involvement or a DPA has not heretofore been protested by any of the parties. EDS and GPO seek to dismiss the protests because the allegations that the procurement comes within the coverage of the Brooks Act had not been raised by any party from the time the solicitation was issued until the award had been made, a period of over one year. These arguments confuse the distinctions between jurisdiction and timeliness.

The CICA granted this Board authority to hear and decide protests involving Brooks Act procurements. With this authority came the jurisdiction to determine our jurisdiction. In an appropriate case, a party's failure to contest the fact that an agency is proceeding in disregard of Brooks Act provisions, may affect the relief the Board affords on the merits of the protest, however, the failure to contest this point earlier does not take the procurement outside of the Brooks Act provisos so that we lack jurisdiction. In addition, the solicitation made no reference to whether a DPA had been sought or obtained. On the record before us, we find no basis for determining this protest to be untimely filed.

The Board, however, finds that GPO is subject to the Brooks Act, and that this procurement involves both ADP resources and printing services, the former which rebuttably brings this specific procurement within the Brooks Act. Xerox, Volt, AT&T and GSA have raised serious matters regarding GPO's conduct of this procurement which deserve this Board's attention. Thus, the motions of EDS and GPO are denied.

Decision

We deny the motions of EDS and GPO to dismiss for lack of jurisdiction, untimeliness or frivolousness; we deny the motions of AT&T and Volt to strike the supplemental response of EDS; we grant the motions of GSA and GPO for leave to supplement the record.

Vincent A. LaBella
VINCENT A. LaBELLA
Administrative Judge

We concur:

LEONARD J. SUCHANEK
Chief Administrative Judge

CYRUS E. PHILLIPS, IV
Administrative Judge

Board of Contract Appeals

General Services Administration
Washington DC 20405

February 6, 1986

Protests of XEROX CORPORATION	GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.	GSBCA No. 8336-P
Solicitation No. RFP 600-S	Acquisition suspended
Appearances for Protester, Xerox Corporation	Irwin Goldbloom, Esquire Thomas L. Patten, Esquire Franklin G. Snyder, Esquire Linda S. Potter, Esquire Latham, Watkins & Hills 1333 New Hampshire Avenue, N.W. Suite 1200 Washington, DC 20036
Appearances for Protester, Volt Information Sciences, Inc.	Thomas F. Williamson, Esquire Marcia G. Madsen, Esquire D. Brent Israelsen, Esquire Morgan, Lewis & Bockius 1800 M Street, N.W. Washington, DC 20036
Appearances for Respondent, U.S. Government Printing Office	James C. Lane, Jr., Esquire Associate General Counsel Office of General Counsel U.S. Government Printing Office North Capital and H Streets, N.W. Washington, DC 20401
	I. Michael Greenberger, Esquire William S. Moore, Esquire Shea & Gardner 1800 Massachusetts Avenue, N.W. Washington, DC 20036
	Robert S. Gorman, Esquire Contract Law Division U.S. Department of the Army Room 2C439, Pentagon Washington, DC 20310-2208

GSBCA Nos. 8333-P, 8336-P

Appearances for Intervenor, Electronic Data Systems Federal Corporation	Donald C. Holmes, Esquire Joseph D. West, Esquire Michael A. Gordon, Esquire Jones, Day, Reavis & Pogue 655 Fifteenth Street, N.W. Washington, DC 20005-5701
	Richard P. Shlakman, Esquire James D. Duffy, Esquire Electronic Data Systems Federal Corporation 6430 Rockledge Drive Bethesda, MD 20817
Appearances for Intervenor, AT&T Technologies, Inc.	Arthur Lazarus, Jr., Esquire Paul Shnitzer, Esquire Carl J. Peckinpaugh, Esquire Fried, Frank, Harris, Shriver & Jacobson 600 New Hampshire Avenue, N.W. Suite 1000 Washington, DC 20037
Appearances for Intervening Agency, General Services Administration	Richard Shackleford, Esquire Anthony L. Washington, Esquire Claims and Litigation Division Dinah Stevens, Esquire George N. Barclay, Esquire Information Resources and Utilities Division Office of General counsel General Services Administration 18th and F Streets, N.W. Washington, DC 20405

Opinion by Administrative Judge LaBella

The parties to these consolidated protests are the protesters, Xerox Corporation (Xerox), GSBCA No. 8333-P, and Volt Information Sciences, Incorporated (Volt), GSBCA No. 8336-P, an intervenor of right, AT&T Technologies, Incorporated (AT&T)--all three disappointed offerors on the requirements contract, solicitation number RFP 600-S, issued by respondent, the United States Government Printing Office (GPO), for the United States Department of the Army (Army)--the awardee-intervenor of right, Electronic Data Systems Federal Corporation (EDS), and the General Services Administration (GSA), an intervening agency. This opinion reduces to writing the ore tenus decision made at the suspension hearing held on February 5, 1986. Rule 19(d). The Board suspended all performance under the GPO-EDS contract until it renders a decision on the merits of these protests. In addition, GPO and the Army are each prohibited from satisfying any of the Army's requirements which would otherwise have been satisfied under the suspended contract. As new requirements arise, respondent will be permitted to petition the Board for a partial lifting of this suspension order and will be granted such, upon a showing that "urgent and compelling circumstances" significantly affecting the interests of the United States dictate that a particular need be procured.

Background

GPO issued the solicitation and proceeded with this procurement without ever having requested or received from GSA authorization to conduct this procurement. Similarly, Army neither requested nor received any authorization from GSA with respect to this procurement, which, as stated in the "General Scope" section of the RFP, "is for a contractor-provided service and an associated contractor-owned equipment and software supporting system, geographically distributed among approximately 200 sites worldwide, to manipulate millions of pages of text and pieces of artwork into composed pages, and to eventually print and bind approximately 26 million page impressions every business day from a publishing base of well over one trillion bytes." Furthermore, the solicitation was to and did result in "a requirements contract for the services and items and for the period specified" tailored to the requirements of the Army. GPO awarded to EDS the contract on Thursday, January 9, 1986.

On January 16, 1986, Xerox filed its protest and simultaneously requested a suspension hearing and a hearing on the merits. On January 21, 1986, Volt filed its protest with the Board, also simultaneously requesting a suspension hearing and a hearing on the merits.[1] The tenth calendar day after award for suspension purposes was January 21, 1986 (the tenth calendar day fell on Sunday, January 19, 1986, and the following Monday was a federal holiday). Rule 2(c).

A suspension hearing was scheduled for February 5, 1986. On February 5, 1986, prior to the hearing, GPO filed notice with this Board that it would not present evidence on suspension. Consistent with this notice, at the hearing GPO and the Army presented no evidence to avoid a suspension. Respondent conceded that it could not establish "urgent and compelling circumstances" to avoid suspension, Transcript at 5-6, and no showing was made that urgent and compelling circumstances existed to fulfill any individual requirement under this contract.

Discussion

These protests were filed after contract award. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (CICA), contains the following directive to the Board regarding suspensions of procurement authority for protests filed after award:

> (A) If the Board receives notice of a protest under this subsection after the contract has been awarded but within 10 days after the contract award, the board shall, at the request of an interested party and

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[1] The grounds of protest are enunciated in Xerox Corp., GSBCA No. 8333-P, Volt Information Systems, Inc., GSBCA No. 8336-P (Feb. 4, 1986).

> within 10 days after the date of the filing of the protest hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest.
>
> (B) The board shall suspend the procurement authority of the Administrator or the Admistrator's delegation of procurement authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

§ 2713(a), 98 Stat. 1175, 1182 (to be codified at 40 U.S.C. § 759(h)(3)). These provisions are implemented in Rule 19(a)(2), (b), and (d).

The Board is cognizant of the statutory language quoted above which states that "within 10 days after the date of the filing of the protest [the Board is to] hold a [suspension] hearing." However, CICA also provides that:

> The board shall conduct such proceedings . . . as may be required for the expeditious, fair, and reasonable resolution of the protest.

§ 2713(a), 98 Stat. 1175, 1183 (to be codified at 40 U.S.C. § 759(h)(4)(A)). Here, Xerox and Volt each filed its protest within ten days after contract award. In light of the fundamental question raised by EDS and GPU concerning the exemption of GPO from the coverage of the Brooks Act, which would exclude this protest from the Board's jurisdictional authority, we exercised restraint, by not intruding into the procurement process at that time, and at the request of GPO and EDS tolled the period for the convening of a suspension hearing until that issue was resolved. Our opinion of February 4, 1986, holds that GPO is not exempt from the Brooks Act, so that we shall proceed with this protest. With this issue decided, the question of suspension is ripe for a decision.

In this procurement, neither GPO nor Army either requested or received authority from the Administrator of GSA to conduct this procurement. This failure to obtain a delegation of procurement authority (DPA) does not, however, mean that the Board is without the authority to suspend the procurement. Such a restrictive interpretation of CICA would undermine the intent and purpose behind the enactment of the statute to make the Board an effective forum in the ADP protest arena and would be contrary to the mandatory nature of the suspension ("[t]he board shall suspend") which explicitly places the burden on the federal agency to demonstrate "urgent and compelling circumstances" mitigating against suspension. Protesters have rebuttably established the applicability of the Brooks Act to this procurement, so that it appears at this time that GPO failed to obtain the requisite GSA authorization to conduct this procurement and thereby violated a statute. Therefore, GPO's proceeding without the requisite DPA is subject to the application of the same suspension principles as if it had obtained a DPA.

To avoid a suspension, CICA places the burden on the procuring agency to demonstrate that "urgent and compelling circumstances" do not permit the waiting for the Board's decision on the merits. Here, GPO and Army made no such showing. Therefore, we suspend the GPO-EDS contract and prohibit GPO and the Army from satisfying any of the requirements within the requirements covered under that contract pending our decision on the merits. The Army is not prohibited from fulfilling any of its requirements which do not fall within the requirements which would otherwise be satisfied under the suspended contract.

We recognize that a requirements contract is involved and that Army requirements may arise for which the Army or GPO may be able to demonstrate the existence of "urgent and compelling circumstances" necessitating procurement before we render a decision on the merits. Because we interpret CICA's suspension language as permitting us to fashion to the specific circumstances of each protest the reach and scope of a temporary suspension, NCR Comten, Inc., GSBCA No. 7698-P, 85-1 BCA ¶ 17,903, if the Army or GPO successfully makes such a showing to the Board on a requirement-by-requirement basis, we leave open the alternative to partially lift the prohibition against satisfying such a requirement.

This suspension does not reach to any portion of the GPO-EDS contract which has been delivered and accepted prior the close of business on February 5, 1986. CICA, § 2713(a), 98 Stat. 1175, 1183 (to be codified at 40 U.S.C. § 759(6)(B)) ("If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation"). However, the suspension applies to any order already placed but not delivered and accepted.

Decision

The GPO-EDS contract is temporarily suspended pending our resolution of this protest on its merits. Subject to the provisions above, this suspension precludes either GPO or the Army from satisfying any of the requirements which would otherwise be satisfied under the suspended procurement.

VINCENT A. LaBELLA
Administrative Judge

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS

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PROTESTS OF: :
XEROX CORPORATION : GSBCA No. 8333-P
and :
VOLT INFORMATION SCIENCES, : GSBCA No. 8336-P
INC. :
(Solicitation No. RFP 600-S) :
- - - - - - - - - - - - - - - - x

Wednesday, February 5, 1986
Room 4042
General Services Administration
18th & F Streets, N.W.
Washington, D.C.

The Suspension Hearing in the above-entitled matter was convened, pursuant to notice, at 2:00 p.m.

BEFORE:

VINCENT A. LaBELLA
Administrative Judge

APPEARANCES:

On behalf of Protester, Xerox Corporation:

IRWIN GOLDBLOOM, Esq.
FRANKLIN G. SNYDER, Esq.
DAVID R. HAZELTON, Esq.
THOMAS L. PATTEN, Esq.
Latham, Watkins & Hills
1333 New Hampshire Ave., N.W.
Suite 1200
Washington, D.C. 20036

printing authority to an agency. I would not at all be surprised if the Army has some delegations of authority. If you want to sweep that in, we will abide by any unsuperceded Order. We want to abide by it but we would like to be told clearly what we have to abide by.

JUDGE LaBELLA: I will make every effort to be clear.

MR. GORMAN: Your Honor, one other thing. The Army is not a party to this Protest. If you could keep that in mind when you structure your Order, as to how it is going to apply to GPO versus the Army.

JUDGE LaBELLA: The Army is represented here, Mr. Gorman, as co-counsel for Respondent. The way I view this case is that there is one Respondent. It turns out that one part of Respondent is doing the procuring, the other part of the Respondent has the requirements, and they go part and parcel with one another. That is why I admitted you into this proceeding as co-counsel for Respondent.

MR. GREENBERGER: Your Honor, in fairness on that point, I thought at the beginning that when you did that, we did have a discussion. We said that Mr. Gorman could be co-counsel in the case as long as it was understood this was a GPO contract and not an Army contract.

JUDGE LaBELLA: That's quite correct, and that I expected Respondent to speak with one voice. That was my position and it still is my position. There are some aspects to this, perhaps, where the Army has more to say than GPO and GPO has nothing to say, as you have just said.

MR. GREENBERGER: That is absolutely right.

JUDGE LaBELLA: I would still want to hear the Army's point of view on that. That's why Mr. Gorman is permitted, at my suggestion, to be co-counsel for Respondent. Otherwise, we might have had some other arrangement. I think it is a workable solution.

MR. GORMAN: In my participation as co-counsel in this case, I have been careful not to take a position that I thought was inconsistent with the GPO's position because GPO is the party to the case. I see my role as co-counsel with GPO. I have an attorney/client relationship with GPO. I have not taken any positions that I thought might be --

JUDGE LaBELLA: We are getting some interference back here, and I am having trouble hearing you.

MR. GORMAN: I have been careful not to take any positions that I thought might be inconsistent with the Army's position, because the Army was not a party to this case. Now I think you are telling me that the Army is in fact -- or the Government --

JUDGE LaBELLA: The Army's views are being heard here. They have been from day one.

MR. GORMAN: If we cannot file our own filings, then the position you are hearing is GPO's.

JUDGE LaBELLA: If you have something to say, you may make a filing with respect to the areas that GPO has no inconsistent views on. There are certain areas of this, with respect to the requirements, for instance, that you have primary knowledge of, and I would expect that information to come from you.

MR. GORMAN: Through GPO, which is the way I saw it.

JUDGE LaBELLA: Right. That's fine. That is the way I want it to work. I don't see anything inconsistent about that.

MR. GORMAN: When you are suspending the Army's authority to print and not GPO's authority, to enter into this contract and issue orders under this contract, you are going much farther than the GPO and its contract, and going all the way to the Army's authority to get its printing done.

JUDGE LaBELLA: Perhaps you will understand it a little better when you see it in writing.

I also received this morning from Intervenor, EDS, a Motion to Dismiss untimely allegations, contained in Protester's complaints. I have considered the Motion. I have decided to deny it, on the basis that it was filed out of time. I have prepared a response to it, a brief response to it, with an accompanying letter, which I will ask my legal assistant to give to each of you.

Board of Contract Appeals

General Services Administration
Washington DC 20405

February 13, 1986

Protests of **XEROX CORPORATION**	GSBCA No. 8333-P
VOLT INFORMATION SCIENCES, INC.	GSBCA No. 8336-P
Solicitation No. RFP 600-S	Motion to strike designation of Army counsel as co-counsel for GPO granted; intervention granted for Army
Appearances for Protester Xerox Corporation	Irwin Goldbloom, Esquire Thomas L. Patten, Esquire Franklin G. Snyder, Esquire Linda S. Potter, Esquire Latham, Watkins & Hills 1333 New Hampshire Avenue, N.W. Suite 1200 Washington, DC 20036
Appearances for Protester Volt Information Sciences, Inc.	Thomas F. Williamson, Esquire Marcia G. Madsen, Esquire D. Brent Israelsen, Esquire Morgan, Lewis & Bockius 1800 M Street, N.W. Washington, DC 20036
Appearances for Respondent U.S. Government Printing Office	James C. Lane, Jr., Esquire Associate General Counsel Office of General Counsel U.S. Government Printing Office North Capital and H Streets, N.W. Washington, DC 20401
	I. Michael Greenberger, Esquire William S. Moore, Esquire Shea & Gardner 1800 Massachusetts Avenue, N.W. Washington, DC 20036

	Robert S. Gorman, Esquire U.S. Department of the Army Office of the Judge Advocate General Contract Law Division (DAJA-KL) The Pentagon, Room 2C349 Washington, DC 20310-2208
Appearances for Intervenor Electronic Data Systems Federal Corporation	Donald C. Holmes, Esquire Joseph D. West, Esquire Michael A. Gordon, Esquire Jones, Day, Reaves & Pogue 655 Fifteenth Street, N.W. Washington, DC 20005-5701
	Richard P. Shlakman, Esquire James D. Duffy, Esquire Electronic Data Systems Federal Corporation 6430 Rockledge Drive Bethesda, MD 20817
Appearances for Intervenor AT&T Technologies, Inc.	Arthur Lazarus, Jr., Esquire Paul Shnitzer, Esquire Carl J. Peckinpaugh, Esquire Fried, Frank, Harris, Shriver & Jacobson 600 New Hampshire Avenue, N.W. Suite 1000 Washington, DC 20037
Appearances for Intervening Agency General Services Administration	Richard Shackleford, Esquire Anthony L. Washington, Esquire Claims and Litigation Division Dinah Stevens, Esquire George N. Barclay, Esquire Information Resources and Utilities Division Office of General Counsel General Services Administration 18th and F Streets, N.W. Washington, DC 20405

GSBCA Nos. 8333-P, 8336-P

Order of Hearing Examiner Burkholder

On January 23, 1986, the Department of the Army moved for permission to intervene in these protests pursuant to Rule 5(a)(3)(ii) ("[m]otion to intervene by intervening agency"). That motion was denied in the Board's order of January 24, 1986. In that order the Board found that the Army was not an intervening agency as that term is defined in Rule 1(b)(5), and went on to state:

> Since there can be only one respondent, the Board will permit counsel for the Department of the Army to appear as co-counsel for respondent since respondent, U.S. Government Printing Office, has agreed to this. The Board, however, will require respondent to speak with one voice.

In an order of February 6, 1986, memorializing its ore tenus decisions made at the suspension hearing held the day before, the Board stated:

> The Board suspended all performance under the GPO-EDS contract until it renders a decision on the merits of these protests. In addition, GPO and the Army are each prohibited from satisfying any of the Army requirements which would otherwise have been satisfied under the suspended contract. As new requirements arise, respondent will be permitted to petition the Board for a partial lifting of this suspension order and will be granted such, upon a showing that "urgent and compelling circumstances" significantly affecting the interests of the United States dictate that a particular need be procured.

The Army and GPO have now jointly moved to strike the designation of Army counsel as co-counsel for GPO, and the Army has renewed its motion to intervene. The Army and GPO cite as grounds for their joint motion: (1) the experience of both parties that the Army's interests do not coincide exactly with those of GPO, and (2) the possibility that on some matters there may indeed be a conflict between GPO's and the Army's positions. Counsel for both parties agreed that because there is in fact no attorney-client relationship between Army counsel and GPO, ethical questions are also raised by Army counsel's present status.

As grounds for the renewal of its motion to intervene, the Army voices two major concerns: (1) that discovery will be complicated and perhaps hindered because of the lack of an attorney-client relationship between GPO's counsel and the Army, and (2) that if the Army is not a party to the protests, it will not have direct access to the Board to present the "urgent and compelling circumstances" it would need to show to achieve partial relief from the Board's suspension order.

In its original order permitting Army counsel to appear as co-counsel for GPO the Board relied in great part on GPO's acquiescence. Since GPO has now joined with the Army in the motion to strike the designation of Army counsel as co-counsel for GPO, the Board will not force GPO to be represented by counsel it has not chosen. Accordingly, the joint motion of the parties is **GRANTED**, and the Army counsel will henceforth no longer be permitted to appear as co-counsel for GPO. The Board's order of January 24, 1986, is **VACATED** to that extent.

As for the Army's renewal of its motion to intervene as an intervening agency, the Board is not persuaded by the second of the two grounds advanced; insofar as any partial relief that the Army might request from the suspension order is concerned, it must procure its printing services through GPO in any event, so there would not seem to be any problem with its seeking relief through GPO.

The Army's first point, however, is well taken. These protests involve, to put it mildly, very complex matters. The Board did not consider this type of case--encompassing a number of Government agencies with varying degrees of involvement or interest in the subject procurement--when it amended its rules to provide for intervention in protests. It remains clear that the Army is not an "intervening agency" as defined in the rules. Nevertheless, in order to obviate the potential for discovery problems adverted to by Army counsel, and also because of the general complexity of the issues and the intra-agency relationships involved here, the Board will invoke its Rule 1(d) to **GRANT** the Army's motion to intervene as an intervening agency. The Board's order of January 24, 1986, is further **VACATED** to such extent. The Army is cautioned to abide by the provision of Rule 5(a)(3)(ii) that such an intervention is allowed only to the extent that it will "not unduly delay or prejudice the adjudication of the rights of the original parties."

John A. Burkholder
JOHN A. BURKHOLDER
Hearing Examiner

Before The

GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS

Washington, D. C. 20405

Protests of XEROX CORPORATION and VOLT INFORMATION SCIENCES, INC. Relating to the Government Printing Office Solicitation No. 600-S	GSBCA Nos. 8333-P and 8336-P

OBJECTION OF RESPONDENT GOVERNMENT PRINTING OFFICE TO INTERROGATORIES AND REQUESTS FOR DOCUMENTS OF XEROX CORPORATION AND AT&T TECHNOLOGIES, INC.

Respondent, the Government Printing Office ("GPO"), hereby objects to the interrogatories and requests for documents served upon it by Xerox Corporation ("Xerox") and AT&T Technologies, Inc. ("AT&T"). GPO objects to those interrogatories in toto on the ground that the sheer volume of them is burdensome and oppressive and on the further ground that the interrogatories on their face demonstrate that Xerox and AT&T made no attempt to limit their inquiries to matters reasonably calculated to lead to the discovery of admissible evidence or to matters available from GPO but instead engaged in a wholesale fishing expedition. GPO also objects to a number of specific interrogatories and requests for documents on the grounds that they are obviously irrelevant to the issues in this protest or misdirected to GPO.

I. The Interrogatories and Requests for Documents Are Objectionable in Their Entirety Because They Are Burdensome and Oppressive and No Attempt Has Been Made to Confine Them to Issues in The Protest or Information Available from GPO

The sheer number of interrogatories and requests for documents which Xerox and AT&T have served on GPO makes these parties' written discovery objectionable in its entirety, particularly in light of the very short time frame that GPO has in which to respond. Even apart from that consideration, the written discovery served upon GPO by Xerox and AT&T is objectionable, because it makes clear that those parties made no attempt to confine that discovery to matters reasonably related to the issues in this protest or to matters available from GPO.

Technically, Xerox has served 71 interrogatories on GPO, while AT&T has served 77. However, those numbers are very misleading because many of the interrogatories consist of several parts. See, for example, Xerox Interrogatory Nos. 4, 5, 6, 9, 10 and 11, all of which have 9 parts. Including parts of interrogatories which asked for separate items of information, Xerox has submitted 288 interrogatories to GPO while AT&T has submitted 134, for a total of 422. Even these numbers grossly understate the true number of interrogatories because many of the interrogatories ask that several different types of information be given "for each individual identified" or "for each team identified." Finally, the interrogatories ask that a great number of documents be identified, and the requests for production of documents seek production of all the documents identified as well as a number of other documents.

Interrogatories and requests for documents of this magnitude would be unreasonable and oppressive even in a normal court proceeding with thirty days to answer and that same period in which to make objections. See, e.g., McLaughlin v. Fellows Gear Shaper Co., 102 F.R.D. 956 (E.D. Pa. 1984) (112 interrogatories and subparts are unduly burdensome); Jones v. Holy Cross Hospital Silver Spring, Inc., 64 F.R.D. 586 (D. Md. 1974) (70 interrogatories many of which contained from 2 to 23 subparts were overbroad); Boyden v. Troken, 60 F.R.D. 625 (N.D. Ill. 1973) (209 interrogatories containing 432 separate questions were overbroad); Jarosiewicz v. Carlisk, 60 F.R.D. 121 (N.D. Ill. 1973) (277 interrogatories were overbroad). In this protest, where GPO has only four working days to answer interrogatories and to produce documents and only 24 hours in which to make objections, written discovery of this magnitude is clearly overbroad.

The interrogatories and requests for documents served on GPO by Xerox and AT&T are also objectionable in their entirety because it is clear on the face of those interrogatories that they constitute a fishing expedition. For example, several multi-part interrogatories relate to evaluations done early on in the procurement process which are not relevant to any of the protest allegations and also were not relied upon by the contracting officer in making his award. See Xerox Interrogatory Nos. 4, 5, 7, 8, 9, 11 and 12. In addition, the interrogatories ask such irrelevant but quite burdensome questions as the identities and roles of "each individual who participated in creating or developing the 600-S program," and the identities and roles of "each individual who evaluated or ascertained the needs of the Army or GPO for the 600-S program." Aside from clearly irrelevant questions and requests, the interrogatories contain a number of questions and requests that clearly should have been directed to the Army or some other party besides GPO. In this regard, a great number of the AT&T interrogatories relate to the benchmark tests performed by the Army evaluators or to other technical matters of which Army personnel have more direct knowledge. See, for example, AT&T Interrogatory Nos. 24-28, 30-56.

Thus, the interrogatories and requests for documents served by Xerox and AT&T are unreasonably burdensome in number and also demonstrate that Xerox and AT&T did not make a reasonable attempt to determine which interrogatories and requests for documents were reasonably calculated to lead to the discovery of admissible evidence and properly directed to GPO. In these circumstances, GPO should not be required to sift through the mass of interrogatories and requests for documents dumped on it to try to identify all those which are objectionable in the 24 hours available for that purpose. Instead, the interrogatories and requests for documents served on GPO by Xerox and AT&T should be struck down in their entirety, thereby requiring those parties to submit written discovery that is at least within the realm of reasonableness.

II. Particular Interrogatories And Requests for Documents Are Objectionable Because They Either Seek Clearly Irrelevant Information or Are Misdirected to GPO

As indicated above, a number of the interrogatories and requests for documents served on GPO are either clearly irrelevant or misdirected to GPO because they should have been directed to the Army or some other party.

The following interrogatories, and the requests to produce documents identified in those interrogatories, are objectionable because the information requested is in whole or in part irrelevant: Xerox Interrogatory Nos. 1-5, 7-9, 11-13, 25-31, 35-41, and 43; and AT&T Interrogatory Nos. 2-4, 13, 58, 64(i), 66, 73, 75, and 76.

The following interrogatories, and the requests to produce documents in those interrogatories, are objectionable because such interrogatories and requests should have been directed to the Army or to some other party: Xerox Interrogatory Nos. 4, 5, 6, 13, 17-19, 22-31, 34-42, 45-47, 56, 61, and 70; and AT&T Interrogatory Nos. 1, 5-12, 14, 16, 21-22, 24-28, 30-56, 59-63, 64(d)-(h), 70 and 74.

Conclusion

For the reasons given above, the interrogatories and requests for documents served upon GPO by Xerox and AT&T should be held objectionable in their entirety, or, in the alternative, the specific interrogatories identified above should be held objectionable.

Respectfully submitted,

James C. Lane, Jr.

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Counsel for Respondent
The Government Printing Office

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION,

Plaintiff

v.

THE GENERAL SERVICES
ADMINISTRATION BOARD OF CONTRACT
APPEALS AND THE GENERAL SERVICES
ADMINISTRATION,

Defendants

C. A. No. 86-0353

FILED
[illegible] 1986
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the application for a Temporary Restraining Order, the Court finds that the plaintiff has not shown such immediate and irreparable injury or loss, as evidenced by the discussion with counsel in chambers and a review of the pleadings to date, as would entitle the applicant to a Temporary Restraining Order.

Therefore, it is this 7th day of February, 1986, at 5:50 P.M.,

ORDERED that the application for Temporary Restraining Order is denied without prejudice; and it is

FURTHER ORDERED that the oral request to intervene by Xerox Corporation, Volt Information Sciences, Inc., AT&T Technologies, Inc., and the motion of the Government Printing Office to appear as amicus curiae and to file briefs in support of plaintiff are hereby granted; and it is

FURTHER ORDERED that the defendants and intervenors shall file their dispositive motions and oppositions to the application for Preliminary Injunction on or before February 14, 1986, by 4:00 P.M., with hand delivery on all parties; and the plaintiff and amicus shall file their responsive pleadings on or before February 19, 1986 at 4:00 P.M. and serve all parties by hand; reply briefs, if any, by all parties and amicus shall be filed by 4:00 P.M. on February 21, 1986 and served by hand; and it is

FURTHER ORDERED that a hearing on all motions and the Preliminary Injunction application shall be and is hereby set for 2:00 P.M. on February 25, 1986.

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION
6430 Rockledge Drive
Bethesda, Maryland 20817

Plantiff,

v.

Civil Action No. 86-353

THE GENERAL SERVICES
ADMINISTRATION BOARD OF
CONTRACT APPEALS,
18th and F Streets, N.W.
Seventh Floor
Washington, D.C. 20405

and

THE GENERAL SERVICES
ADMINISTRATION,
18th and F Streets, N.W.
Washington, D.C. 20405

Defendents.

DECLARATION OF COLONEL RAYMOND FRANKLIN MILWEE, JR

I, Raymond Franklin Milwee, Jr., do declare that:

1. I am a commissioned officer in the United States Army serving in the rank of Colonel. Since April 1984, I have been assigned as Director of Publications for the Army. I have a Bachelor of Science Degree from Florida State University and I am a graduate of the Army War College. In my role as Director of Publications, I am responsible for ensuring that all of the Army's publishing needs are satisfied. The information

contained in this affidavit is from my personal knowledge or information provided to me by my subordinates and gathered at my direction.

2. The purpose of this affidavit is to explain the harm that will result to the Army from the continued suspension of procurement authority ordered by the Administrative Judge of the General Services Administration Board of Contract Appeals in a protest proceeding relating to Government Printing Office Solicitation NO. 600-S.

3. The suspension order, dated February 6, 1986, precludes the GPO and the Army from satisfying any of the printing requirements which would have otherwise been performed under the suspended procurement.

4. The immediate effect of the order is to prevent the printing of Army publications that were the subject of the 600-S solicitation. A description of the types and volume of documents that are affected follows.

5. The Army has been informed by the Government Printing Office (GPO) that the following contracts cannot be used to satisfy Army printing needs because the printing requirements under these contracts would have been performed by the 600-S contractor.

1513-M
1417-M
2395-M
1520-S
1618-M
421-M
2412-M
2391-M
1276-S
3371-S

6. The suspension order will prevent the printing of newly created publications as well as the reprinting of existing publications. The majority of the new publications that will not be printed are publications for the U.S. Army Training and Doctrine Command (TRADOC) and the U.S. Army Tank Automotive Command (TACOM). Substantial numbers of reprint publications needed to replenish the stock of a variety of Army publications Army-wide will also not be printed.

7. Currently there are 32 TRADOC publication requirements awaiting printing which are affected by the suspension order. This requirement increases an average of two (2) new orders each day. These include field manuals, training circulars and soldier training publications (STP). Twenty-three Army Service Schools (Training Centers) depend on various of these publications. The schools affected include the combat arms training centers such as the Infantry, Armor and Field Artillery schools. Also included is the Academy of Health Sciences, responsible for the training of military physicians and health care specialists. Over 76,000 soldiers are enrolled in these schools. They depend on the publications for their training. Any delay in the receipt of the publications degrades the qualilty of their training and hampers the schools in their mission to train soldiers in critical skills.

Of particular importance are the STP publications. These training manuals, constantly updated and extremely time sensitive, are relied upon by all enlisted soldiers to prepare for Army skills proficiency tests. These tests are a prerequisite to qualification for promotion. Delays in promotion adversely affect unit readiness and soldier morale.

Some of TRADOC publications that are ready to be submitted for printing include:

FM 101-31-2/3	Nuclear Weapons Employment
FM 101-03-3	Nuclear Contamination Avoidance
FM 24-27	Communications Security Application
FM 23-1	Bradley Fighting Vehicle Gunnery
STP 11-93-D JB	Air Traffic Control Systems, Subsystems Equipment Repair

8. TACOM has 42 existing publication requirements which are affected by the suspension order. The requirement increases by an average of one (1) new order each day. These publications include technical manuals for maintenance and operation of the new M1A1 (The Abrams) tank scheduled for fielding in Europe in the March/April time-frame. If these publications are delayed, soldiers will not have the official manuals necessary to properly operate and maintain the tanks.

Some of the TACOM publications awaiting printing include:

TM 9-2330-368-14P

Operator's organizational, direct support and general support maintenance manual including repair parts and special tools list for trailer, ammunition, heavy mobility, 11-Ton.

TM 9-2350-222-34P-1

Direct support and general support maintenance repair parts and special tools list (including depot maintenance repair parts) for Combat Engineer Vehicle, full-tracked : M728.

TM 9-2350-255-34-1-1-2-1

Direct support and general support maintenance manual for tank, combat, full-tracked: 105-MM, Gun, M1 and PM1 General Abrams Hull.

Many of the publications awaiting printing are changes to existing publications. These changes contain updated information concerning equipment modifications and, in some cases, contain information necessary to correct major defects in fielded manuals used by soldiers worldwide. The delay of these publications may endanger the health and safety of soldiers and can adversely impact on equipment and unit readiness.

9. In addition to the impact on new TRADOC and TACOM publications, the Army as a whole is precluded by the suspension order from reprinting existing publications of all types for Army commands worldwide. Reprinting is necessary to replenish stocks of Army regulations and other administrative publications, technical manuals, field manuals and other Army publications. Currently, there are 729 orders on hand. That number will increase at an average rate of 22 per day. By March 30, 1986, the backlog for reprints will reach 1,719.

10. By March 30, 1986, the total accumulated backlog for the TRADOC, TACOM, and reprint publications discussed above will amount to approximately 3.0 billion impressions (or pages).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February 1986, at Arlington, Virginia.

Raymond Franklin Milwee, Jr.
Colonel, GS
Director of Publications

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION, Plaintiff, v. THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS AND THE GENERAL SERVICES ADMINISTRATION, Defendants.	C. A. No. 86-0353 (Judge Hogan)

AFFIDAVIT OF SAMUEL BRUCE SCAGGS

Samuel Bruce Scaggs, having been duly sworn according to law, states as follows:

1. I am Samuel Bruce Scaggs, the Assistant Public Printer for Procurement in the United States Government Printing Office ("GPO"). I have held this position since February 1985. Prior to assuming this position I held several other positions within the GPO. They include: Director of Document Sales Service, from December 1982 to February 1985; Special Projects Officer from December 1981 to December 1982; and Manager of the Printing Procurement Department from January 1980 to December 1981. All told, I have been employed at the GPO for twenty-nine years. I also have many years experience as a pressman both for the GPO and in private industry. To the best of my knowledge and belief, the facts contained in this affidavit are true and correct.

2. As Assistant Public Printer for Procurement, I am familiar with the policies, procedures, and regulations that govern procurements undertaken and contracts awarded by GPO.

3. Pursuant to 44 U.S.C. § 502, GPO engages in contracts for printing work for virtually all of the United States Government.

4. As Assistant Public Printer for Procurement, I am familiar with the existing contracts which GPO has entered into to provide printing work for other elements of the United States Government, including the existing contracts which the GPO has entered into to provide printing work for the United States Army. As Assistant Public Printer for Procurement, I am also familiar with the procurements which GPO is involved in to obtain contracts to provide printing work for other elements of the United States Government.

5. As Assistant Public Printer for Procurement, I have familiarity with the procurement involved in this case and with the contract entered into by GPO as the result of that procurement process, the "600-S contract," a $300,000,000 procurement to provide important Army printing. I am also familiar with the proceedings that have taken place in the General Services Administration Board of Contract Appeals ("GSBCA") concerning the 600-S procurement and with the requirements that have been imposed on GPO in those proceedings. In addition, I am familiar with other proceedings concerning the 600-S procurement and contract which involve the General Accounting Office ("GAO") and the Office of Management and Budget ("OMB").

6. On February 6, 1986, the GSBCA entered an order suspending the 600-S contract pending the GSBCA's decision on the merits of the protests

filed with respect to that contract. The February 6, 1986, suspension order states:

> "[W]e suspend the GPO-EDS contract [600-S contract] and prohibit GPO and the Army from satisfying any of the requirements within the requirements covered under that contract pending our decision on the merits. The Army is not prohibited from fulfilling any of its requirements which do not fall within the requirements which would otherwise be satisfied under the suspended contract."

In other words, any printing that would have been performed under the 600-S contract had that contract not been challenged and suspended cannot be done at all. Alternative methods of providing that printing are forbidden, unless the GPO and Army show on a case-by-case basis that "'urgent and compelling circumstances' significantly affecting the interests of the United States dictate that a particular need be procured." Id. at 3.

7. Because of GSBCA's February 6, 1986 suspension order, GPO has determined that all printing of Army technical, training and field manuals done in-house at GPO must be terminated. In the government's last fiscal year, this in-house printing alone amounted to approximately nine million dollars. In addition, GPO has determined that no printing of Army technical, training and field manuals can be performed by contractors under the following multiple-vendor contracts: 1513-M; 1417-M; 421-M; 2395-M; 2412-M; 1618-M; and 2391-M. Moreover, Army printing cannot be done under the 1520-S contract, a single-vendor contract, and when two additional single-vendor contracts expire February 28, 1986, they cannot be renewed because of the GSBCA's order. I understand that a representative of the Army plans to submit an affidavit to this Court in this proceeding today and that that affidavit will show that the

GPO's inability to fulfill the aforesaid Army needs will cause an immediate and substantial adverse impact upon important programs of the United States Army and upon the maintenance of important battlefield equipment.

8. If the GSBCA's February 6, 1986 order is not lifted until after GSBCA has reached the merits of the protests made to the 600-S procurement, GPO will incur substantial additional printing cost when that order is lifted. Even a two-week delay in fulfilling the Army's printing needs will create a substantial printing backlog and that backlog will require extraordinary handling which might well increase the price of that printing by hundreds of thousands of dollars.

9. GPO is at present involved in a number of procurements which, according to the position taken by the protestors in this proceeding, could be challenged in the GSBCA. Those contracts include a procurement for printing work for the Internal Revenue Service ("IRS") that is ready for award. Representatives of IRS have indicated that the work to be done under that contract would be used in connection with 1985 federal income tax returns due on April 15, 1986. Two other pending procurements which according to the position of the intervenors here could be challenged in the GSBCA also involve printing work to be done for the IRS. Other pending procurements subject to challenge in the GSBCA involve the Social Security Administration and the Air Force. With respect to these pending procurements, if GPO finishes the procurements and proceeds to award contracts, it is faced with the very strong possibility that the contracts awarded will be challenged in the GSBCA, and perhaps overturned by the GSBCA.

10. The Brooks Act applies only to procurements involving general purpose automatic data processing equipment. 40 U.S.C. § 759(g) provides in pertinent part:

> "The Administrator [of the General Services Administration ("GSA")] shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Bureau of the Budget [now the Office of Management and Budget ("OMB")] unless the President otherwise directs."

In the proceedings before GSBCA, the GSA has disagreed with GPO's position that the 600-S procurement does not involve general purpose automatic data processing equipment and therefore is not subject to the Brooks Act or the jurisdiction of the GSBCA. Because there is thus an "absence of mutual agreement" between GSA and GPO as to whether the 600-S procurement is subject to the Brooks Act and GSBCA's jurisdiction, GPO by letter of February 3, 1986 referred that question to the OMB. GPO has been informed by letter that OMB will decide that issue by March 4, 1986. A copy of this letter is attached hereto. Thus, GPO is being required to participate in the GSBCA proceedings involving the GPO's procurement even though decision on an issue dispositive of those proceedings -- whether the 600-S procurement is subject to the Brooks Act -- is due very soon from OMB.

11. Although the proceedings in the GSBCA are still at a relatively early stage, those proceedings have imposed a very significant burden on GPO and substantially interfered with its ability to perform other work. In particular, preparation of the "protest file" in the manner required by GSBCA has

been very onerous for GPO. The GSBCA's Rule 4, 48 C.F.R. § 6101.4, generally requires a defending agency to file a protest file and to serve the exhibits in the protest file on other parties, but Rule 4(e), 48 C.F.R. § 6101.4(e), provides that "[t]he Board may waive the requirement to furnish other parties copies of bulky, lengthy, or outsized documents submitted to the Board as exhibits." Under Rule 4(e), documents treated as lengthy, bulky, or outsized are to be made available to other parties by the procuring agency and the copy of those documents filed with the Board is also to be made available to other parties. Pursuant to this rule, GPO filed and served on the five other parties in the GSBCA proceeding exhibits consisting of several thousand pages, but with respect to a few exhibits totalling well over 10,000 pages, it filed copies of those exhibits with the GSBCA but did not serve them on the parties, taking the position that those exhibits constituted lengthy or bulky documents within the meaning of Rule 4(e). Upon complaint of the protestors, GSBCA ruled on February 10, 1986, that "it would not apply Rule 4(e) to this case," and GSBCA ordered GPO to copy and serve on the five parties in the case the documents GPO had considered bulky or lengthy. Compliance with the GSBCA's order required GPO to make approximately 100,000 copies within a two-day period. In all, preparation of the protest file required GPO to make over 120,000 copies and perform considerable other related work. In addition, several hundred hours of GPO employee time were expended in preparation of the protest file.

12. The General Counsel's staff of GPO, consisting of four lawyers, was heavily involved in the preparation of the protest file and has also been

heavily involved in other aspects of the GSBCA proceeding, so much so that it is difficult for that staff to perform the other necessary legal work of GPO. In addition, because of the extensive legal work required in the GSBCA proceedings, GPO has been compelled to retain private counsel to assist the General Counsel's office in those proceedings. If the GSBCA proceedings go forward, those proceedings will continue to impose very substantial burdens on GPO. In this regard, the GSBCA's schedule for the proceedings provides for extensive discovery, including what promises to be very substantial additional document discovery from GPO, and for a full evidentiary hearing which would probably last several days and perhaps even weeks.

13. During this same period, the GAO, at the request of the House Committee on Government Operations (chaired by Congressman Brooks), is conducting an inquiry concerning the 600-S procurement. GAO investigators are in the process of arranging interviews with GPO employees involved in that procurement. GAO has also requested that documents relating to the 600-S procurement be copied and made available to it. In addition, it is my understanding that in the future GAO plans to review other documents relating to the 600-S procurement at a later date. Dealing with this GAO investigation at the same time as the GSBCA proceeding has increased the already very onerous burden imposed on GPO by the GSBCA proceeding.

14. As indicated above, the GSBCA proceedings have required and will continue to require an extremely heavy commitment of manpower and other resources by GPO. In particular, the General Counsel's staff of GPO has been and would continue to be almost completely absorbed by the GSBCA proceedings

and private counsel have also been retained to participate in those proceedings. Thus, GPO is now being put through a proceeding which is stretching its available resources to the breaking point even though we are firmly convinced that that proceeding is not the proper one and that the proper proceeding would not require nearly as great an expenditure as the existing GSBCA proceeding.

Samuel B Scaggs
Samuel Bruce Scaggs

Subscribed and sworn to before me this
14th day of February, 1986.

Notary Public

My Commission Expires: October 14, 1989

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 9 1976

Honorable Jack Eckerd
Administrator of General
   Services
Washington, D.C. 20405

Dear Mr. Eckerd:

The General Services Administration (GSA) has submitted to the Director of the Office of Management and Budget (OMB) a dispute concerning the award of a contract for the operation of Government-owned automatic data processing (ADP) equipment by the Department of Transportation (DOT). The dispute, submitted for resolution pursuant to the provisions of 40 U.S.C. 759(g), concerns DOT's failure to follow the requirements of and regulations of GSA under the "Brooks Act" which GSA insists apply to this procurement.

The Contract.

A Department of Transportation contract (DOT-TSC-1147 the "contract") for its Transportation Systems Center (TSC) became effective January 1, 1976. The one year, cost reimbursement plus fixed fee, level of effort type contract with KENTRON HAWAII, LTD. is for automatic data processing (ADP) support services. The contract price was estimated to be $1,928,294 with the reimbursements to be based upon actual man-hours expended, and permitted two one-year options to renew. The work is being performed at Government facilities at Kendall Square, Cambridge, Massachusetts. The contract was negotiated pursuant to 41 U.S.C. 252(c)(10), which is the authority to negotiate Government contracts "for property or services for which it is impracticable to secure competition."

The contract reflects the importance the contracting parties placed upon acquiring and retaining experienced personnel and requires the contractor to assist in retaining its employees for work on subsequent, similar contracts (Additional Provisions, 4). For contract work which is required to be performed on premises under Government control, the contractor (except as set forth in the contract) furnishes all supplies, material and equipment, provides direct supervision of its own employees and, by the terms of the contract, does not accept supervision from Government personnel (Additional Provisions, 5). The contractor is required to comply with Government safety rules and such other precautions as the Contracting Officer requires (Additional Provisions, 6). During official closings of the TSC when Government employees receive pay, the contractor's employees are also excused from duty with pay (Additional Provisions, 7). The contract requires under "Technical Direction and Monitorship" the following:

> "The performance of the work required under this contract shall be subject to the technical direction of the Technical Monitor/Submonitor(s) of the Data Services Division. As used herein 'technical direction' encompasses direction to the Contractor which fills in details required in pursuit of certain lines of inquiry or otherwise serves to accomplish the contractual statement of work. The technical direction to be valid (1) must be issued consistent with the general scope of the work set forth in this contract; (2) may not constitute new assignment of work or change to the express terms, conditions or specifications incorporated into this contract; (3) shall not constitute a basis for any increase in any fee and/or extension of the contract delivery schedule. The Contracting Officer will designate the Technical Monitor under this contract. Such representative as may be appointed will be specifically designated in a letter from the Contracting Officer to the Contractor. The Technical Monitor will not be authorized to change the Scope of Work or any of the terms and conditions of this contract. Nothing contained in this article authorizes the Contractor to incur costs in excess of the estimated cost set forth in this contract."

Contractor personnel have the same legal holidays as Government employees (Additional Provisions, 11). Certain key personnel of the contractor may not be assigned to other positions without the consent of the Contracting Officer (Additional Provisions, 13).

The Statement of Work states that "the objective of this work is to provide technical and operational support to the data processing activities of the Transportation Systems Center (TSC). The management and administrative responsibility for this work will rest with the Data Services Division within the Office of Administration. Services will be accomplished by the contractor acting under ADP Job Orders (tasks) issued by the TSC Technical Monitor or his authorized submonitors." Five ITEMS follow with eight pages of descriptive detail on contractor responsibilities. The five ITEMS are: Scientific Applications Programming and Analysis; Analog/Hybrid Simulation and Analysis; Administrative Applications Programming and Analysis; Facility Operations; and System/Planning.

The Statement of Work also includes Reporting and Documentation Requirements to assign ADP resources to benefiting programs, to maintain progress reports on each task, to maintain funding and manpower reports under the contract and to provide several specialized and technical reports. The contract also sets forth the projected "manning schedules" to meet the requirements of the Statement of Work. A total of 102 man-years is projected. Inspection and acceptance of work and reports is made on-site by the TSC Monitor and the Contracting Officer.

The contract lists the government-owned ADP equipment to be operated by the contractor and provides for the supply of such office equipment as the Contracting Officer determines to be necessary. The contract work is performed on-site.

Background.

During the months of June and July, 1970, the NASA Electronics Research Center, Cambridge, Massachusetts, was, with the approval of the General Services Administration, transferred to the Department of Transportation. This facility, composed of certain land, buildings and computer equipment, is now known as the Transportation Systems Center (TSC). The TSC is devoted to research and development type activities. From documents received from the Department of Transportation it appears that several, similar support contracts were in effect at the facility at the time of transfer. At the time of the transfer two aspects of those contracts were considered which are of interest now--whether the contracts were valid procurements under the rules and regulations of the Civil

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Service Commission, and whether these contracts were subject to GSA's authority with regard to ADP procurement. The documents furnished by DOT do not reflect a disposition by that agency of the first issue. However, the occurrence of the most recent procurement effective January 1, 1976, indicates that if the issue was considered, it was determined that the contracts do not violate the Civil Service Commission's rules and regulations. The documents do reflect, however, a resolution of the second issue. By letter dated November 2, 1970, GSA advised NASA that when contracting for major support services where the contractor is to perform ADP services for support of Government equipment at a Government site, GSA's Federal Property Management Regulation (FPMR) on ADP procurement would not be applicable.

Apparently at some time prior to the award date of the DOT-TSC contract now at issue, GSA asserted that the contract must be processed in accordance with GSA's FPMR set forth in 41 CFR 101-32. DOT determined that the proposed contract was not subject to those procedures and proceeded with the award of the contract without compliance with the FPMR.

OMB's Authority to Review and Decide.

GSA and DOT have construed this disagreement to be one authorized to be resolved by the Office of Management and Budget pursuant to the authority granted in Section 111(g) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759). This section was added by Public Law 89-306, the so-called "Brooks Act." DOT and GSA have submitted the matter to OMB pursuant to 41 CFR 101-32.001 and have furnished additional information at OMB's request relevant to their respective positions.

The authority granted the Administrator by the "Brooks Act" was "subject to direction by the President and to fiscal and policy control exercised by the Bureau of the Budget" (Section 111(g) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759)). "In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determination shall be subject to review and decision by the Bureau of the Budget unless the President otherwise directs." (40 U.S.C. 759(g)). The "proposed determinations" referred to consist of "... each proposed determination specifically affecting them [all agencies and other users concerned] or the automatic data processing equipment or components used by them" (40 U.S.C. 759(g)). The Report of the Committee on Government Operations of the House of Representatives on H.R. 4845 (House Report No. 802, 89th Congress, 1st Session, August 17, 1965, the "House Report") states that "Action by any agency under this legislation would be subject to either approval or review by BOB" (p. 4). The policy control of BOB and directive authority of the President made it unnecessary and inadvisable "...to authorize discretionary authority in agency heads to exempt equipment from the program" (House Report, p. 6).

DOT and GSA have concluded that their disagreement over whether the contract awarded by DOT is within the scope of the "Brooks Act" is a disagreement susceptible of resolution by OMB pursuant to Section 111(g) authority. We agree.

The question concerning the interpretation of the scope of the dispute-resolving authority vested in OMB by the "Brooks Act" is essentially one of statutory interpretation. Typically, difficult questions of statutory construction within the Executive branch are resolved by reference to the Attorney General. However, in a situation such as this where a statute requires an agency to make determinations in particular situations, that agency must, at least initially, decide whether those particular situations exist. The guidance of the Attorney General may be sought in future doubtful cases of jurisdiction, and, of course, judicial review of the ultimate decisions could be obtained in an appropriate forum.

DOT asserts and GSA agrees that the issue is whether the contract is for the use of ADP with which GSA by the terms of the "Brooks Act" may not interfere (40 U.S.C. 759).

DOT and GSA have argued this matter and prepared and submitted information to OMB in this appeal as though the issue was one to be resolved as a matter of standard statutory interpretation. Although certain issues of statutory interpretation must be made incidental to this review by OMB, the review contemplated by the Act and conducted here is not one solely of statutory interpretation. It is clear in our view that the "Brooks Act" contemplated a different type of review by OMB. Although it is not the purpose of this document to discuss the parameters of OMB action and direction, it is clear that action directed or recommended by OMB under Section 111(g) could not, for example, contravene a requirement of the "Brooks Act," although policy direction could condition the use or in some instances preclude the use of authorities provided in the Act. At the same time, this policy direction by OMB would not encompass the augmentation of GSA's authority to direct a particular course of action. Furthermore, we believe that in doubtful cases the statutory design and intent should generally be instructive as to the policy direction issued. But in the appellate process as set forth in the "Brooks Act," OMB is to review not only what was recorded during the development of the legislation, but also to review the issue from a current fiscal and policy perspective as the statute provides.

In our view, the issues are whether this DOT-TSC support service contract is one which falls within the scope of the "Brooks Act," and whether these types of contracts should be subject to GSA authority under the "Brooks Act." Our review is limited to the issues presented under the "Brooks Act" and is not intended, and should not be construed as, an approval by OMB of other aspects of the procurement or of the contract.

The Scope of the Brooks Act.

In order to be subject to GSA's authority under the "Brooks Act," the contract must be one for the purchase, lease or maintenance of automatic data processing equipment. By design, the Congress omitted a precise definition of ADP equipment which was intended to be covered by the "Brooks Act." The House Report in discussing "general-purpose, mass-produced, commercially available ADP components used in conjunction with specially designed components" which would come within the provisions of what was then the "Brooks bill," stated that:

> "Although the ADP to be included under this management program could be more closely defined at this time, the committee is concerned that rapidly shifting development in the interrelated fields of defense, space, communications, and ADP could make any presently acceptable distinctions obsolete. And, as this legislation involves the internal operations of the Government, there is no pressing need for strict statutory definitions. As in keeping with the general concept of H.R. 4845, the specific definitions of general-purpose ADP equipment is left to the BOB and GSA and the issuance of appropriate regulations (House Report, p. 34)."

The "Brooks Act," however, uses only the term ADP *equipment* and does not refer to ADP resources or services. The debates in both Houses at the time of consideration refer exclusively to equipment and do not refer to resources or services. The emphasis by the sponsor of the legislation was that "H.R. 4845 is aimed at general purpose, commercially available, mass produced automated data processing systems and components." Vol. 111, *Cong. Record*, p. 22823, September 2, 1965), and further "[I]n summary, therefore, the bill covers only general purpose, mass-produced, commercially available automatic data processing components, 90 percent of Government automatic data processing...." (Vol. 111, *Cong. Record*, p. 22823, September 2, 1965). The House Report broadly describes ADP in response to "What Is ADP?" (pages 6-13) and discusses systems, computers, software, leasing and third generation ADP. That discussion also discusses "Mass Produced Components" and "General Purpose Components" as follows:

> "MASS PRODUCED COMPONENTS
>
> "ADP manufacturers mass produce the various components that make up a computer system. ADP systems are 'configured' (attached by cables and essentially 'plugged' together) by combining the mass produced components previously described necessary to meet the requirements of a particular user. The task to be performed determines the arrangement, number, and type of components that make up a computer system. For economic and competitive reasons, only the smallest systems are designed and manufactured as a single unit. Since a system is made up of separate components, the customer is not asked to pay for punched card, tape, memory, printer, or other components or capacity not needed in his particular application.
>
> "GENERAL PURPOSE COMPONENTS
>
> "Most ADP components are general purpose in design and can be used in a variety of applications. Most digital computer systems can be programmed to perform a wide variety of functions--administrative and technical. That equipment designed to be used in these various systems for the performance of different

> functions is known as 'general purpose' equipment. About 90 percent of the computers in Government are general purpose. The table on the following page has been included as an indication of the varied applications of the general purpose ADP systems of which the Government has 10 or more. Specially designed equipment for unique scientific and technical purposes has been decreasing. Computer manufacturers constantly strive for flexibility in the design of their components in order to give them as broad a potential application as possible.
>
> "Under the concept of 'General Purpose' equipment, the combination of mass produced components can be easily altered to perform any task within the basic system's maximum capacity without rebuilding the processor or internally modifying the individual component parts even though the system may have been originally configured to perform one particular narrow function. If additional memory is needed for a new application, additional memory components can usually be added. If additional reading capacity is required, additional punched card or tape units can be obtained. Similarly, unnecessary components can be easily discarded."

The House Report drew a distinction between the "hardware" which were the mass-produced, general purpose components and the "software" which "custom-tailored" the components for each installation by the use of computer programs, compilers, special-purpose routines, and specialized training and systems aids which generally have costs for which savings are not realized by virtue of multiple installations. Software was discussed as something which could benefit from more orderly procurement, but also something which the "Brooks Act" did not cover (House Report, p. 29). Software was not something the House Report believed should interfere with the concept of bulk purchase of the mass-produced, general purpose ADP "hardware."

The House Report also discussed the purposes of H.R. 4845.

> "H.R. 4845 is aimed primarily at filling three vital management needs at this time. These are (1) more adequate management

information, (2) optimum utilization through sharing and multiple use, and (3) economic acquisition. Realization of an economic ADP acquisition program, in turn, involves three principal factors:

> "(a) Improving the Government's bargaining position through volume acquisitions;
>
> "(b) Basing lease versus purchase evaluations, whenever possible, on the long-term value of the equipment to the Government as a whole; and
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> "(c) Selecting that equipment for purchase which, on a Government-wide basis, offers the largest purchase advantage."

As discussed, in our view the legislative history and certainly the plain meaning of the "Brooks Act" do not support the contention that the Act included or intended to include these types of support service contracts within GSA's authority. It also does not appear from the legislative history of the Act or from the information supplied by DOT and GSA or from information otherwise available, that these purposes of the "Brooks Act" would be significantly served by an interpretation of the definition of the ADP equipment to include the support services for that equipment once the equipment has been acquired by the Government. Although there may be some marginal benefit from the inclusion of those contracts within GSA's authority for "more adequate management information" or for "sharing and multiple use" it is not now apparent that the benefit would justify GSA involvement. The general inability to acquire these services by volume acquisitions would appear to minimize the opportunity to reduce costs by volume acquisition. At this time, economic acquisition does not appear to be a forseeable consequence of GSA involvement in the procurement of the ADP support service contracts.

We are aware of a decision of the Comptroller General, B-151204, B-157587, 48 Comp. Gen. 462, which interprets one of the Comptroller General's earlier decisions (47 Comp. Gen. 275) as subjecting the procurement of punch cards and tabulating paper to the "Brooks Act." In our opinion, the scope of the "Brooks Act" does not clearly cover this type of "software;" however, we have agreed with the application of the "Brooks Act" procedures to the procurement of certain "software" items which would be consistent with the purposes of the Act. Neither the application of that Comptroller General decision nor the purpose of the "Brooks Act," however, would extend the Act's coverage to these support services. In a more recent decision, the Comptroller General has implied that such support services would not be covered by the "Brooks Act," 55 Comp. Gen. 60, 67.

The DOT and GSA Arguments.

DOT contends that: (1) the review of agency procurements of supportive services for the operation of agency owned ADP equipment violates the "Brooks Act;" (2) such action by GSA would interfere with agency use of ADP; (3) that the "Brooks Act" was not intended to cover the acquisition of services; and (4) that GSA has previously interpreted the "Brooks Act" as not applying to this procurement. DOT points to legislative history supporting its contentions.

GSA argues that: (1) the issue is whether GSA is violating the specific prohibition in the "Brooks Act" designed to preclude GSA interference with an agency's use of ADP; (2) GSA's "review" of these procurements is to ensure (a) economical and efficient procurements, (b) compliance with relevant statutes and procurement regulations and (c) use of regional contracts for certain ADP support services; (3) GSA has specific authority over software which this contract is for; (4) even though the Act talks only in terms of ADP equipment, the legislative history indicates that services were included; (5) GSA has ADP management responsibilities which would provide sufficient authority to review this procurement; and (6) that the prior GSA letter of 1970 did not address the authority of GSA under the "Brooks Act."

As stated, in our view, the issues presented are whether the procurement of ADP support services is within the scope of the "Brooks Act" and whether it should be. The legislative history does not clearly support an interpretation of the Act to include the procurement at issue. If DOT is arguing that GSA's involvement with ADP equipment not authorized by the Act is interference with the use of ADP equipment, that may well be true, but the crucial point is that this procurement does not fall within the "Brooks Act." We do not consider GSA's 1970 letter to NASA on the scope of its FPMR to preclude GSA from altering that position now, even if that 1970 letter was GSA's interpretation of the scope of the "Brooks Act."

The argument by GSA that their "review" of these types of contracts is to ensure compliance with relevant statutes and procurement regulations is not one supported by the purposes of the "Brooks Act." Furthermore, while compliance with statutory and regulatory provisions is desirable, we see no particular reason to deal specially with these types of contracts by requiring review to determine compliance with other statutes; e.g., the Privacy Act. The argument that the "review" ensures economical and efficient procurements and promotes the use of regional contracts for certain support services is consistent with the thrust of the "Brooks Act." As a matter of statutory interpretation, however, we do not see that these contracts are clearly within or intended to be within the scope of the provisions of the "Brooks Act." Furthermore, as to a potential exercise of our "policy making" function, we do not feel that there is a sufficient basis at this point to believe that treatment of these types of contracts under the procedures of the "Brooks Act" would constitute an improvement in the method by which these procurements are now undertaken. Fundamental to a centralized procurement authority should be the reasonably foreseeable prospect of achieving economies and improved efficiencies in procurements subject to that authority. In the absence of such a prospect and in view of the desirability of permitting each agency to control its own course in acquiring, in this instance, support services, the agencies should continue to procure these services. As noted, however, both DOT and GSA have submitted this question for resolution in a manner similar to that used in resolving questions solely by statutory interpretation. They have not had occasion to submit materials on the prospect of economy and efficiency of such a practice. As will be discussed, such an opportunity should be afforded, but it should be in a manner apart from the review process here.

We agree that as a function of "policy making" under the Act, current as well as historical events should be considered, although as an element of statutory interpretation we find such a practice to be limited. Although GSA has certain ADP management responsibilities, the failure of the "Brooks Act," which specifically concerns ADP procurement, to clearly cover support service procurements, precludes reliance upon previously existing and more general authority to achieve the results GSA argues follow from coverage by the "Brooks Act."

In this context, we read the May 6, 1975, letter from Mr. Antonin Scalia, the Assistant Attorney General, Office of Legal Counsel, as stating that the "Brooks Act" through FMC 74-5 (39 F.R. 29355) is inapplicable to contractors who use ADP "...unless the very subject matter of the contract (or of a severable portion of the contract) is the supplying of ADP services to a federal agency", as not covering the DOT-TSC contract where, for example, the ADP is Government owned and the procurement is solely for support services. In a situation such as the DOT-TSC contract, the "Brooks Act" cannot be "seriously undermined" since it is not a contract for the "ADP work" of an agency, but is only for the support services for ADP equipment, the procurement of which would be covered by the "Brooks Act." In other words, we do not read Mr. Scalia's letter to include ADP support services within the term "ADP equipment" as used in the "Brooks Act."

Decision.

We have approved certain GSA definitions as to the scope of coverage of the "Brooks Act" to include "software" when the purposes of the Act were foreseen to be served in the volume acquisition of fungible "software" items (even though in our opinion the legislative history leaves the question open to substantial doubt) as an exercise of our "policy making" and GSA's implementing responsibilities. We have also urged the agencies to state their needs for ADP requirements, whenever feasible, in terms of performance specifications as opposed to a particular make or model of equipment, despite statements such as "[U]nder this legislation, GSA is not charged with either the selection or the use of equipment" (House Report, p. 29); the amendment in the House Government Operations Committee to the term "requirements" in Section 111(g) (House Report, p. 36); and the flat assurance by the primary sponsor of the Act that "[U]nder this legislation, the agencies and the contractors will continue to select exactly the equipment they require just as they do now. As I have previously indicated, if a user determines that an IBM 360 is needed to meet his requirements, that is what he will get." (Vol. 111, Cong. Record, p. 22023, September 2, 1965). We have so acted because under the circumstances to do so would further the purposes of the "Brooks Act," and it was otherwise reasonable and feasible. In this instance, however, the advantages of requiring these contracts to pursue the "Brooks Act" procedures are not apparent.

The instant appeal is resolved, therefore, for the determination that the "Brooks Act" procedures are not applicable to the DOT-TSC contract and those procedures should not be applied by GSA to similar contracts.

Sincerely yours,

(Signed) Paul H. O'Neill

Paul H. O'Neill
Deputy Director

cc:
Honorable William T. Coleman, Jr.
Secretary of Transportation

Mr. Heffelfinger (AsstSecAdmin, DOT)